ARTICLE

A RETROSPECTIVE ON TWENTY-FIVE YEARS OF THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT

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I. INTRODUCTION

In 1982, President Reagan signed into law a statute intended to clarify the law regarding the extent of federal courts' power to enforce U.S. antitrust laws extraterritorially.[1] Title IV of the Export Trading Company Act of 1982, the Foreign Trade Antitrust Improvements Act (FTAIA), has failed at its essential purpose. Far from bringing clarity to the law of extraterritorial antitrust enforcement, the FTAIA has introduced confusion into a regime that, before its enactment, was a modestly successful common-law scheme.[2] The statute's failings are certainly

1. *See* Export Trading Company Act of 1982, Pub. L. No. 97-290, tit. IV, §§ 401–03, 96 Stat. 1233, 1246–47 (codified at 15 U.S.C. § 6a (2000)) (enacting the Foreign Trade Antitrust Improvements Act (FTAIA) of 1982); *see also* Daniel T. Murphy, *Moderating Antitrust Subject Matter Jurisdiction: The Foreign Trade Antitrust Improvements Act and the Restatement of Foreign Relations Law (Revised)*, 54 U. CIN. L. REV. 779, 781 (1986) (discussing passage of the FTAIA in conjunction with the Export Trading Company Act (ETCA)).

2. Prior to the FTAIA, extraterritoriality was governed by the "effects test," most prominently attributed to Judge Hand's opinion in *United States v. Aluminum Co. of America* (*Alcoa*), 148 F.2d 416, 444 (2d Cir. 1945), *superseded by statute*, FTAIA of 1982, Pub. L. No. 97-290, tit. IV, 96 Stat. 1246. *See* Max Huffman, *A Standing Framework for Extraterritorial Antitrust*, 60 SMU L. REV. (forthcoming 2007) (manuscript at 18–21, on file with author), *available at* http://ssrn.com/abstract=925876; *see also* Conservation Council of W. Austl., Inc. v. Aluminum Co. of Am., 518 F. Supp. 270, 275 (W.D. Pa. 1981) (noting that the antitrust laws in 1981 did not "'give[ ] any clear indication of the scope of the extraterritorial jurisdiction conferred'" and that the "determination is left to the courts" (quoting Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1291 (3d Cir.

attributable to poor drafting.[3] They might also be explained by U.S. antitrust courts' resistance to engage in traditional statutory analysis in the antitrust arena.[4] The enactment of the FTAIA, then, has had the effect of adding an "inelegantly phrased"[5] and "opaque"[6] statute to an area of the law that was already "confused and unsettled."[7]

Despite its shortcomings, the FTAIA is a massively important statute.[8] It governs activity at the vanguard of private

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1979))).

3. *See* 1 SPENCER WEBBER WALLER, ANTITRUST & AMERICAN BUSINESS ABROAD § 9:7, at 9-10 (3d. ed. 2005) ("At a linguistic level, this statute clarifies nothing."); 2 SPENCER WEBBER WALLER, ANTITRUST & AMERICAN BUSINESS ABROAD § 13:23, at 13-62 (3d ed. 2006) (describing the FTAIA as "obscure and badly drafted" and "poorly thought-through"); *see also* ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 225 (2007) [hereinafter AMC REPORT], *available at* http://www.amc.gov/report_recommendation/amc_final_report.pdf ("The complex wording of [FTAIA], however, has also resulted in ambiguities. The territorial scope of the Sherman Act and who may bring a claim under it thus remain unclear.").

4. *See, e.g.*, United States v. Nippon Paper Indus. Co., 109 F.3d 1, 4 (1st Cir. 1997) (declining to interpret the FTAIA in an extraterritoriality case by relying on *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), which did not place any weight on the FTAIA); *see also* Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters, 459 U.S. 519, 531 (1983) (noting "that Congress intended the [Sherman] Act to be construed in the light of its common-law background").

5. *Nippon Paper*, 109 F.3d at 4.

6. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 20 (Free Press 1993) (1978) (describing the "singularly opaque" language of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 (2000), an antitrust statute that shares the FTAIA's poor draftsmanship); *see also* 1 WALLER, *supra* note 3, § 9:7, at 9-10 to -11 ("At a linguistic level, [the FTAIA] clarifies nothing."). The opaque language of the FTAIA establishes its birthright in the family of the U.S. antitrust laws. The FTAIA reads in full:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
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> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
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> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
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> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

15 U.S.C. § 6a (2000).

7. *See* Den Norske Stats Oljeselskap As v. HeereMac VOF (*Statoil*), 241 F.3d 420, 423–24 (5th Cir. 2001) (describing the complexity of the case law surrounding the Sherman Act); *see also* Turicentro v. Am. Airlines, 303 F.3d 298 (3d Cir. 2002) (citing *Statoil*, 241 F.3d at 429–31 ("The history of this body of case law is confusing and unsettled.")).

8. *See* 1 WALLER, *supra* note 3, § 9:7, at 9-12; *see also* AMC REPORT, *supra* note 3, at 225 ("The importance of clarity in this area has grown in recent years.").

efforts to achieve compensation for alleged anticompetitive activity, in which domestic class-action lawyers look overseas to increase their client base, and foreign plaintiffs themselves look overseas at plaintiff-friendly procedures and substantive legal rules uniquely available under the U.S. antitrust scheme.[9] As Judge Wood wrote in 2001, "[t]he volume of international transactions has exploded; old political barriers to trade and commerce have fallen; and the world of cyberspace is quickly erasing what is left of national boundaries for economic purposes."[10] Belying much-exaggerated "'reports of the death of antitrust,'"[11] the litigation boom in the antitrust extraterritoriality arena boasts scores of suits filed in the past decade, many consolidated into massive multi-district litigation proceedings, together seeking billions of dollars in damages, pre-trebling, for harms allegedly suffered by members of world-wide plaintiff classes.[12] Judicial and legislative practices in

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9. As Professor Waller notes, the FTAIA was intended to "limit the rights of foreign plaintiffs generally under United States antitrust laws." *See* 1 WALLER, *supra* note 3, § 9:9, at 9-34. The U.S. system is fraught with advantages that make U.S. courts attractive places to vindicate harms suffered elsewhere on the globe. *See* Huffman, *supra* note 2 (manuscript at 1) (listing various factors that have "combined to bring foreign plaintiffs in ever-increasing numbers into U.S. courts"). The U.S. system promises "jury trials, wide-ranging pretrial discovery without judicial supervision, . . . extraterritorial discovery, treble damages, class actions, [and] contingent fees." Joseph P. Griffin, *Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 GEO. MASON L. REV. 505, 516 (1998). These features combine, according to a justice department official, to create "a multi-color brochure for international antitrust tourism that will surely be—indeed, already is—irresistible to many foreign plaintiffs." Makan Delrahim, Deputy Assistant Attorney Gen., Remarks at the American Bar Association Section of Antitrust Law Fall Forum: Department of Justice Perspectives on International Antitrust Enforcement: Recent Legal Developments and Policy Implications 17 (Nov. 18, 2003), *available at* http://www.usdoj.gov/atr/public/speeches/201509.pdf; *see also* Donald B. Houston & Jeanne L. Pratt, *Jurisdictional Issues in International Cartel Cases: A Canadian Perspective*, 19 INT'L L. PRACTICUM 21, 25 (2006) (noting that the prospect of treble damages under U.S. law "is very attractive to plaintiffs in Canada and in other parts of the world").

10. Diane P. Wood, *Foreword* to MARK R. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER, at xi, xi (2d ed. 2001).

11. *See* Adam J. Pernsteiner, *Speaking Volumes*, BUS. L. TODAY, Nov./Dec. 2004, at 9, 9 (reviewing and quoting ELIOT G. DISNER, ANTITRUST LAW FOR BUSINESS LAWYERS: QUESTIONS, ANSWERS, LAW, AND COMMENTARY 1 (2d ed. 2003) ("The reports of the death of antirust law some time ago were premature.")).

12. *See, e.g.*, *In re* Intel Corp. Microprocessor Antitrust Litig., 452 F. Supp. 2d 555, 561–64 (D. Del. 2006) (dismissing an antitrust case for failure to show more than a ripple effect in the United States despite the plaintiffs' allegations of "'competitive injury, both in U.S. commerce and throughout the world-wide market of which the U.S. portion is but an indivisible part'"); *In re* Dynamic Random Access Memory Antitrust Litig., Nos. C 02-1486 PJH, C 05-3026 PJH, 2006 WL 515629, at *1 (N.D. Cal. Mar. 1, 2006) (alleging an international price-fixing conspiracy in computer memory); CSR Ltd. v. Cigna Corp., 405 F. Supp. 2d 526, 548 (D.N.J. 2005) (suing foreign insurers who refused to write new insurance contracts or renew older contracts); *In re* Monosodium Glutamate Antitrust

interpreting and amending the antitrust laws also elevate the importance of the FTAIA; the slow pace of amendments to the federal antitrust scheme, driven partly by antitrust courts' experience in advancing doctrine through common-law analysis rather than statutory interpretation, means that even a poorly conceived and drafted statute can remain on the books *ad infinitum*.[13]

This Article considers the twenty-five years since the FTAIA's enactment in 1982. In Part II, the Article describes the statute's history, including the preceding common-law development that Congress explicitly approved and largely adopted in the FTAIA. Part III discusses the FTAIA's language in depth, concentrating on the particular interpretive issues that have arisen, and the surprisingly important and difficult procedural questions presented by the statute. In Part IV, the Article explores areas in need of judicial clarification if the statute remains in its present form, as well as the involvement of the Antitrust Modernization Commission geared toward interpreting, and possibly recommending amendments to, the FTAIA.

II. HISTORY OF THE FTAIA

A. The Common Law of Antitrust Extraterritoriality

1. Early Cases. Modern-day rules governing extraterritorial enforcement are the result of nearly a century of

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Litig., No. Civ. 00MDL1328, 2005 WL 2810682, at *1 (D. Minn. Oct. 26, 2005) (claiming, on behalf of a worldwide class, that defendants engaged in a global price-fixing scheme), *aff'd*, 477 F.3d 535 (8th Cir. 2007); Latino Quimica–Amtex v. Akzo Nobel Chems. B.V., No. 03 Civ. 10312(HBDF), 2005 WL 2207017, at *1 (S.D.N.Y. Sept. 8, 2005) (recognizing the plaintiffs'—Mexican, Argentinean and Colombian purchasers of chemicals—allegation of a global price-fixing scheme). "Improved methods of detection, as well as increased global awareness of the harms of anticompetitive conduct, have led enforcers to prosecute vigorously global price-fixing conspiracies that affect world-wide commerce." AMC REPORT, *supra* note 3, at 225 (noting, as well, the increase in private treble-damages actions).

13. *See* JOELSON, *supra* note 10, at 36 (noting that development of the law governing antitrust extraterritoriality "has occurred largely through the judicial process"). For example, despite near universal condemnation, the Robinson–Patman Act, an antitrust law, remains in force. *See, e.g.*, Paul H. LaRue, *Robinson–Patman Act in the Twenty-First Century: Will the* Morton Salt *Rule be Retired?*, 48 SMU L. REV. 1917, 1917 (2005) ("[T]he Act has been the object of unrelenting criticism by legal scholars and economists."). This act has also produced two Supreme Court opinions in the past fourteen years. *See* Volvo Trucks N. Am., Inc. v. Reeder–Simco GMC, Inc., 126 S. Ct. 860, 866, 872–73 (2006) (examining the Robinson–Patman Act); Brooke Group Ltd. v. Brown & Williamson Tobacco Co., 509 U.S. 209, 220 (1993) (applying the Robinson–Patman Act). *But see* AMC REPORT, *supra* note 3, at 20, 312, 317 ("Congress should repeal the Robinson–Patman Act in its entirety.").

development of the doctrine, beginning with Justice Holmes's 1909 opinion in *American Banana Co. v. United Fruit Co.*[14] In *American Banana*, a case Judge Becker has characterized by its "byzantine" facts,[15] a U.S. company was alleged to have monopoly power in growing and exporting bananas from the United States of Columbia, in a region that comprises modern-day Panama, Costa Rica, and Colombia.[16]

The plaintiff, also a U.S. company, had purchased plantations from another owner, and, allegedly, the defendant requested—for anticompetitive purposes—the Costa Rican military to seize the plaintiff's plantations and the railroad used to transport bananas for export.[17] The plaintiff believed the defendant was liable either for causing the Costa Rican government to engage in conduct toward plaintiff that harmed competition or for conspiring with the Costa Rican government.[18]

Relying on "the general and almost universal rule . . . that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done," Justice Holmes held that the plaintiff's claims were not cognizable in a U.S. antitrust court.[19] Exceptions to the principle that a sovereign

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14. Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909). *But see* Cont'l Ore. Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704–05 (1962) (noting that *American Banana* has been substantially overruled by subsequent Court decisions). *American Banana* was "[t]he first Supreme Court case involving the extraterritoriality of the U.S. antitrust laws." JOELSON, *supra* note 10, at 37.

15. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1161, 1180 (E.D. Pa. 1980).

16. *Am. Banana*, 213 U.S. at 354. At the time of the allegedly anticompetitive conduct, the region was in the process of separating into independent states. *See id.* at 354–55 (describing events occurring between 1899 and 1905); *see also* U.S. Dep't of State, Background Note: Colombia, http://www.state.gov/r/pa/ei/bgn/35754.htm (describing the "War of a Thousand Days" between 1899 and 1903) (last visited Apr. 14, 2007); U.S. Dep't of State, Background Note: Panama, http://www.state.gov/r/pa/ei/bgn/2030.htm (dating Panama's independence from Spain at 1903) (last visited Apr. 14, 2007).

17. *See Am. Banana*, 213 U.S. at 354–55. The plaintiff alleged other conduct as well: raiding of plaintiff's human capital, outbidding competitors for sales, and coercing its own employees not to own stock in plaintiff. *Id.* at 355. But the primary concern was the military takeover of plaintiff's property. *See id.* at 355. Plaintiff's allegations were slightly more involved than detailed here. In part, plaintiff alleged that Astua, a third party, won a judgment in a Costa Rican court declaring that plaintiff's property belonged to Astua; allegedly, agents of the defendant then purchased the property from Austa. *Id.* Somewhat ironically, in its allegations in U.S. court, the plaintiff relied in part on the Costa Rican court's lack of territorial jurisdiction to adjudicate the issue of the ownership of the property. *Id.*

18. *Id.* at 355.

19. *Id.* at 356, 359. *See generally* HENDRIK ZWARENSTEYN, SOME ASPECTS OF THE EXTRATERRITORIAL REACH OF THE ANTITRUST LAWS 94 (1970) (citing H. DONNEDIEU DE VABRES, LES PRINCIPES MODERNES DU DROIT PENAL INTERNATIONAL 32, 33 (1928); A. Mulder, *De Extra-territoriale Werking Van Het Strafrecht*, 51 MEDEDDINGEN VAN DE NEDERLANDSE VERENIGING VOOR INTERNATIONAAL RECHT 14 (1964)).

has authority over conduct by its citizens "in regions subject to no sovereign, like the high seas" or in acts of piracy, did not apply to actors subject to the laws of a foreign government.[20] Instead, "not only were the acts of the defendant in Panama or Costa Rica not within the Sherman Act, but they were not torts by the law of the place and therefore were not torts at all."[21] *American Banana* was an easy case. Properly understood, it is not an antitrust extraterritoriality case at all, but an early application of the "Act of State doctrine," under which U.S. courts will not exercise jurisdiction over acts by a foreign sovereign.[22] Justice Holmes explicitly noted, "[t]he injuries to the plantation and supplies seem to have been the direct effect of the acts of the Costa Rican

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20. *Am. Banana*, 213 U.S. at 355–56; *see also* United States v. Rezaq, 134 F.3d 1121, 1133 n.6 (D.C. Cir. 1998) ("[H]ijacking crimes are subject to universal jurisdiction . . . ."). Justice Holmes's use of the piracy example typifies the operation of the doctrine of "universal jurisdiction." *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987) ("A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism . . . ."). Universal jurisdiction has never been recognized for antitrust offenses. *See* F. Hoffmann–La Roche Ltd. v. Empagran, 542 U.S. 155, 165 (2004) (discussing the limitations of America's jurisdictional reach with regard to anticompetitive behavior that injures foreign, rather than domestic, parties).

21. *Am. Banana*, 213 U.S. at 357. One commentator argued that the *American Banana* rule was justified by the civil tort nature of the proceeding, as opposed to some rule broadly applicable to the U.S. antitrust scheme. ZWARENSTEYN, *supra* note 19, at 124–25. The better view of *American Banana* seems to be that the conduct test held sway in the first half of the twentieth century, and the effects test came to be dominant in the second half. *See infra* notes 37–38 and accompanying text; *see also, e.g.*, Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704–06 (1962) (affirming the rule from *Alcoa* that the effect of foreign conduct is determinative).

22. 1B HERBERT HOVENKAMP, ANTITRUST LAW ¶ 274, at 366 (3d ed. 2006); *see also* Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 605 (9th Cir. 1976), *superseded by statute*, FTAIA of 1982, Pub. L. No. 97-290, tit. IV, 96 Stat. 1246 ("From the beginning, this [act of state] principle has been applied in foreign trade antitrust cases." (citing *Am. Banana*, 213 U.S. 347; Occidental Petrol. Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972))); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1161, 1181 (E.D. Pa. 1980) (noting that the "intimate involvement of instrumentalities of foreign sovereigns [in *American Banana*] implicat[es] the act of state doctrine" and that "[m]any courts have distinguished *American Banana* on act of state grounds" (citing Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir. 1977))).

On the act of state doctrine generally, see *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964) ("The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory."); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) ("Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."); *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana*, 830 F.2d 449, 453 (2d Cir. 1987) (positing that the act of state doctrine is applicable in a case in which "the conduct of the appellees has been compelled by the foreign government").

government."[23] But the rule announced was broader than the facts would seem to require.[24] In closing, the opinion announced the rule that "[a] conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law."[25] *American Banana* generally is understood to have expressed a broad "no extraterritorial[ity]" principle applicable to antitrust claims.[26]

Such apparent aversion to extraterritorial application of the U.S. antitrust laws did not last long.[27] In the 1911 case of *United States v. American Tobacco Co.*, both U.S. and British defendants were liable under U.S. law for a worldwide market-division agreement.[28] And eighteen years after *American Banana*, in *United States v. Sisal Sales Corp.*, the Court reversed a holding by the Southern District of New York that had relied on *American Banana* to dismiss allegations that defendants attempted to monopolize the market for importing sisal, a fiber from plants grown on the Yucatan peninsula in Mexico and used

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23. *Am. Banana*, 213 U.S. at 359; *cf.* Steele v. Bulova Watch Co., 344 U.S. 280, 288 (1952) ("This court agreed[, in *American Banana*,] that a violation of American laws could not be grounded on a foreign nation's sovereign acts."); United States v. Sisal Sales Corp., 274 U.S. 268, 276 (1927) (relying on *American Banana* for the proposition that "'a seizure by a state is not a thing that can be complained of elsewhere in the courts'" (quoting *Am. Banana*, 213 U.S. at 357–58)). *But see* W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., 493 U.S. 400, 407–08 (1990) ("Simply put, *American Banana* was not an act of state case . . . .").

24. *See* JOELSON, *supra* note 10, at 38 (noting that the Court could have relied "on the grounds that no substantial anticompetitive effect on U.S. foreign commerce had been established and that, moreover, a foreign government could not be challenged for acts it undertook within its own territory").

25. *Am. Banana*, 213 U.S. at 359.

26. *See W.S. Kirkpatrick*, 493 U.S. at 407; *see also* McBee v. Delica Co., 417 F.3d 107, 119 n.8 (1st Cir. 2005) ("An older and now discredited view, reflected [in *American Banana*], was that antitrust laws were wholly territorial in nature."); United Phosphorous, Ltd. v. Angus Chem. Co., 322 F.3d 942, 946 (7th Cir. 2003) (en banc) (referring to "*American Banana*'s strict territorial test"); United States v. Nippon Paper Indus. Co., 109 F.3d 1, 3 (1st Cir. 1997) (interpreting Judge Hand's opinion in *Alcoa* as construing *American Banana* narrowly—only to circumstances of extraterritorial conduct with no effect in the United States). According to Judge Becker, the Supreme Court, in *United States v. Pacific & Arctic Railway & Naval Co.*, 228 U.S. 87, 106 (1913), "seemed to imply that it could assert no jurisdiction over foreign corporations operating abroad: 'If we may not control foreign citizens or corporations operating in foreign territory, we certainly may control such citizens and corporations operating in our territory . . . .'" *Matsushita*, 494 F. Supp. at 1182 (omission in original) (quoting *Pac. & Arctic Ry. & Naval Co.*, 228 U.S. at 106).

27. *See Matsushita*, 494 F. Supp. at 1181 ("*American Banana* has never been explicitly overruled. However, its authority has been so eroded by subsequent case law as to have been effectively limited to its specific factual pattern."); Dominicus Americana Bohio v. Gulf & W. Indus., Inc., 473 F. Supp. 680, 687 (S.D.N.Y. 1979) ("There is now broad agreement that [*American Banana*'s] holding on the issue of [extraterritorial] jurisdiction is obsolete.").

28. United States v. Am. Tobacco Co., 221 U.S. 106, 175–81 (1911).

in making agricultural twine.[29] In one important respect, the *Sisal* facts are nearly identical to the essential facts of *American Banana*—in *Sisal*, like *American Banana*, the defendants had gained the help of the foreign sovereign (Mexico) in establishing their monopoly position.[30]

But *Sisal* remains distinguishable from *American Banana*.[31] In *American Banana*, the conduct—monopolization of the production and transportation of bananas—was confined to the geographic territories of Panama and Costa Rica.[32] In *Sisal*, the government alleged conspiratorial activity in the United States.[33] And, where *American Banana* was limited to foreign production and transportation, the allegations in *Sisal* included interference with imports and domestic trade and extraterritorial conduct serving that ultimate end.[34] In 1927, then, the crux of the

29. United States v. Sisal Sales Corp., 274 U.S. 268, 271–72, 276 (1927). Other cases have been cited as the earliest examples of the Supreme Court's recognition of U.S. courts' power over foreign conduct with domestic effects. *See, e.g.*, Thomsen v. Cayser, 243 U.S. 66 (1917) (addressing allegations of restraint of transportation between New York and South Africa). A case like *Thomsen* is easily within U.S. courts' adjudicative power based on the explicit reach in the Sherman Act of "commerce . . . with foreign nations." *See* 15 U.S.C. § 1 (2000); *see also* United States v. Pac. & Arctic Ry. & Naval Co., 228 U.S. 87, 88 (examining the monopolization of transportation routes between U.S. and Canadian ports); *cf. Am. Tobacco Co.*, 221 U.S. at 148 (involving foreign defendants as co-conspirators with U.S. defendants). "The lesson to be learned from these early Supreme Court cases is that the broad language of *American Banana*, implying that the United States could never assert jurisdiction over acts occurring abroad, is not to be construed as controlling . . . ." *Matsushita*, 494 F. Supp. at 1183.

30. *Compare Sisal Sales Corp.*, 274 U.S. at 273 (noting that the Mexican and Yucatanian governments "were persuaded to pass discriminatory legislation"), *with Am. Banana Co.*, 213 U.S. at 354–55 (stating that the Costa Rican government used its military to take property from plaintiff, a competitor of the defendant). An obvious distinction between the two uses of sovereign power is that, in *Sisal*, the conduct—had it occurred in the U.S. in recent years—would be protected under the *Noerr-Pennington* doctrine and the Petition Clause of the First Amendment. *See* Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 STAN. L. REV. 1187, 1238–39 ("Similarly, the Court has recognized, through the *Noerr-Pennington* doctrine, that the Petition Clause of the First Amendment exempts from antitrust liability sincere attempts of private actors to petition government to crush their competitors." (footnote omitted)). That distinction was not relevant when the court decided *Sisal* in 1927. *Sisal Sales Corp.*, 274 U.S. at 268.

31. *See Sisal Sales Corp.*, 274 U.S. at 275 (distinguishing *American Banana*'s "radically different" fact pattern); 1B HOVENKAMP, *supra* note 22, ¶ 274, at 366–67 (noting how *Sisal* is distinguishable from *American Banana*).

32. *See Am. Banana*, 213 U.S. at 357.

33. *Sisal Sales Corp.*, 274 U.S. at 276.

34. *See id.*; *Am. Banana*, 213 U.S. at 354–55 (discussing the plaintiff's loss of the plantation and the railroad used for transporting the produce); *see also* Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704 (1962) (citing *Sisal* to support the proposition that the mere fact some conduct occurs overseas does not remove a conspiracy from the reach of the U.S. antitrust laws); Steele v. Bulova Watch Co., 344 U.S. 280, 288–89 (1952) (distinguishing *Sisal* from *American Banana* because in *Sisal*, it was the defendant's own acts that caused the complained-of harm, rather than the acts of a foreign sovereign as in *American Banana*).

extraterritoriality question might be said to have been a conduct test. U.S. courts could extend their power to hear antitrust cases if any of the alleged conduct occurred in the United States.[35] But U.S. antitrust courts should stay their hands if the conduct alleged was wholly extraterritorial.[36]

2. Alcoa *and the Effects Test.* Under the "conduct" analysis found at the junction between *American Banana* and *Sisal*, Judge Learned Hand's *Aluminum Co. of America v. United States* (*Alcoa*) opinion reflects a dramatic departure and change of emphasis.[37] Most prominently, since *Alcoa*, "it has been relatively clear that it is the situs of the effects as opposed to the conduct, that determines whether U.S. antitrust law applies."[38]

a. *Alcoa*. In 1945, sitting as a court of last resort due to a procedural quirk brought about by four recusals on the Supreme Court, the Second Circuit crafted the "effects test" to define the appropriate extent of U.S. antitrust courts' extraterritorial

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Both conduct and effects are well-grounded bases for the exercise of jurisdiction by a State. *See* Laker Airways Ltd. v. Sabena, 731 F.2d 909, 922 (D.C. Cir. 1984) (listing locus of regulated conduct, locus of harm, and identity of the actor as bases on which a state may exert jurisdiction).

35. *See Sisal Sales Corp.*, 274 U.S. at 276 (evaluating the conduct of the companies, through their "deliberate acts," which sought to enter into a conspiracy); *see also* O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, 830 F.2d 449, 453 n.4 (2d Cir. 1987) (reading *Sisal* and *Continental Ore* as applying a conduct standard); *In re* Uranium Antitrust Litig., 617 F.2d 1248, 1253 (7th Cir. 1980) (treating *Sisal* as announcing a conduct standard); Linseman v. World Hockey Ass'n, 439 F. Supp. 1315, 1324 (D. Conn. 1977) (relying on *Sisal* to conclude that the act of state doctrine is not a defense to conduct occurring in the United States).

36. *See Am. Banana*, 213 U.S. at 357.

37. *See* United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416, 444 (2d Cir. 1945), *superseded by statute*, FTAIA of 1982, Pub. L. No. 97-290, tit. IV, 96 Stat. 1246 ("[A]ny state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends . . . ."). Modern extraterritoriality analyses do not treat foreign government involvement as anathema to U.S. courts adjudicating cases. *Compare* Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 605 (9th Cir. 1976), *superseded by statute*, FTAIA of 1982, Pub. L. No. 97-290, tit. IV, 96 Stat. 1246 ("Even if the *coup de grace* to Timberlane's enterprises in Honduras was applied by official authorities, we do not agree that the doctrine necessarily shelters these defendants or requires dismissal of the [plaintiff's] action."), *with Am. Banana*, 213 U.S. at 357–59 (dismissing the case because of involvement of the Costa Rican military and acquiescence of the foreign government in the allegedly anticompetitive acts). According to the Ninth Circuit in *Timberlane*, "subsequent cases have limited *American Banana* to its particular facts." *Timberlane*, 549 F.2d at 609.

38. H.R. REP. NO. 97-686, at 5 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2490; *see also* Kruman v. Christie's Int'l PLC, 284 F.3d 384, 393 (2d Cir. 2002) (noting that *Alcoa* makes clear "effects," not conduct, is the appropriate inquiry), *abrogated by* F. Hoffmann–La Roche Ltd. v. Empagran, 542 U.S. 155 (2004).

reach.[39] In *Alcoa*, Judge Learned Hand wrote one of the most influential antitrust cases on the books.[40] He announced a rule of extraterritoriality that resonates to the modern day in antitrust and other substantive areas of the law.[41]

Alcoa, a U.S. company, and its Canadian sister company Aluminum Limited, were alleged to have agreed with foreign producers of aluminum to form an international cartel for the purpose of fixing prices.[42] The question was whether the Canadian sibling, Aluminum Limited, violated section 1 of the Sherman Act[43] by agreeing in 1931 with "a French corporation, two German, one Swiss, [and] a British" to form a Swiss corporation called the "Alliance."[44] The Alliance issued shares to

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39. *See Alcoa*, 148 F.2d at 421, 444 (stating that because there was no quorum of six Supreme Court justices to hear the case, 15 U.S.C. § 29 (1946) authorized the appellate court to decide the case and going on to define the effects tests); *see also* 15 U.S.C. § 29 (1946) (recodified at 28 U.S.C. § 2109 (2000)) (authorizing lower courts to hear cases in which a quorum of the Supreme Court is not available "in lieu of a decision by the Supreme Court"); Am. Tobacco Co. v. United States, 328 U.S. 781, 811 (1946) (stating that the unique circumstances of *Alcoa* "add to its weight as precedent"); JOELSON, *supra* note 10, at 38 (stating that Judge Hand was "one of the country's greatest jurists").

The effects test is not unique to antitrust extraterritoriality. Judge Wilkey, in *Laker Airways*, analogized the effects test to the "traditional example of this principle[—]transnational homicide: when a malefactor in State *A* shoots a victim across the border in State *B*, State *B* can proscribe the harmful conduct." *Laker Airways Ltd.*, 731 F.2d at 922 (citing RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW § 18, illus. 2 (1965)).

40. *Alcoa*, 148 F.2d 416; *see also* Steven L. Snell, *Controlling Restrictive Business Practices in Global Markets: Reflection on the Concepts of Sovereignty, Fairness, and Comity*, 33 STAN. J. INT'L L. 215, 247 (1997) ("*Alcoa* remained an influential decision for three decades . . . ."). *But see* Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 VA. J. INT'L L. 1, 9 (1992) ("[*Alcoa*] was frequently criticized by foreign governments and scholars for its failure to consider international comity concerns and the potential interference with foreign sovereignty interests."). The opinion is also, in one respect, perhaps the most vilified opinion in the body of U.S. antitrust law, holding that monopoly power, however gained, is a violation of the Sherman Act. *Alcoa*, 148 F.2d at 431–32. On this holding, *Alcoa* has been overruled. *See, e.g.*, Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 375–76 (7th Cir. 1986) (noting the overruling and stating that a company with a lawful monopoly power has no affirmative duty to, and no liability for failing to, assist its competitors and no liability under the Sherman Act).

41. *See Alcoa*, 148 F.2d at 443–44 (setting out the power of states to reach extraterritorial actions that have an effect on domestic markets); *see also* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 3.1 & n.51 (1995), *available at* http://www.usdoj.gov/atr/public/guidelines/internat.htm (reciting the *Alcoa* "effects test" "[w]ith respect to foreign import commerce," and a variant, the "direct, substantial, and reasonably foreseeable effect[s]" test from the FTAIA "with respect to foreign commerce other than imports").

42. *Alcoa*, 148 F.2d at 421–22.

43. 15 U.S.C. § 1 (2000).

44. *Alcoa*, 148 F.2d at 442.

each member and fixed a quota of production for each share.[45] Each member of the Alliance was required to produce only at the level of the quota multiplied by the number of shares allotted to that member.[46] The court easily concluded—and a court certainly would conclude today—that the output reduction agreements "would clearly have been unlawful, had they been made within the United States."[47]

But whether the agreement among the foreign companies violated U.S. antitrust law was a question of whether "Congress chose to attach liability to the conduct outside the United States of persons not in allegiance to it."[48] *Alcoa* represents a shift in the thinking about extraterritoriality. Unlike *American Banana* and *Sisal*, in which the Court judged its power to hear a claim under the antitrust laws by whether the conduct was illegal in the foreign jurisdiction,[49] in *Alcoa*, a U.S. court's power under the U.S. antitrust laws was held to be a question of Congress's intent, or lack thereof, to reach the extraterritorial conduct with its laws.[50]

Judge Hand announced a two-part test for antitrust extraterritoriality.[51] Overseas conspiracies properly were the subject of suit in a U.S. antitrust court "if they were intended to

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45. *Id.*

46. *Id.* In 1936, the cartel changed its system for allotting production quotas among its members; members that exceeded their prescribed quotas paid royalties to the Alliance, which were divided among the shareholders. *Id.* at 443. The Alliance continued in operation at least until World War II, when "the German shareholders of course became enemies of the French, British and Canadian shareholders in 1939." *Id.*

47. *Id.* at 444; *see also* 15 U.S.C. § 1 (2000); Cal. Dental Ass'n v. FTC, 526 U.S. 756, 773 (1999) (finding agreements to reduce output per se illegal); Alford, *supra* note 40, at 9 (suggesting courts would concur today by noting the test proposed in *Alcoa* has "rapidly gained acceptance in the United States").

48. *Alcoa*, 148 F.2d at 443; *see also* F. Hoffmann–La Roche Ltd. v. Empagran, 542 U.S. 155, 158 (2004) (focusing on conduct, in "significant part foreign, that causes some domestic antitrust injury, and that independently causes separate foreign injury").

49. *See* United States v. Sisal Sales Corp., 274 U.S. 268, 275–76 (1927) (distinguishing the facts from those of *American Banana*); Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909) (concluding implicitly that a U.S. court could have the power to entertain claims of violations of foreign law).

50. *Alcoa*, 148 F.2d at 443; *cf.* JOELSON, *supra* note 10, at 38 (labeling the effects test the "'objective territorial' principle" and the conduct test the "'limited territorial' principle").

If *American Banana* reflects the "conduct" view of extraterritoriality, and *Alcoa* the "effects" view, a third view also exists: U.S. courts generally have been comfortable asserting jurisdiction over conduct by U.S. citizens abroad. *See* Steele v. Bulova Watch Co., 344 U.S. 280, 285–86 (1952) (discussing the U.S. right to regulate citizens' conduct on foreign soil "when the rights of other nations . . . are not infringed" by the assertion of regulatory authority).

51. *Alcoa*, 148 F.2d. at 444.

affect imports and did affect them."[52] The conjunctive nature of this test indicates that it required both elements.[53] Courts have emphasized the importance of the intent requirement in *Alcoa*. According to the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America*, the intent element provides room for flexibility in the degree of effect required for jurisdiction.[54] Additionally, the Third Circuit, in its 1979 *Mannington Mills, Inc. v. Congoleum Corp.* opinion, referred to the *Alcoa* test as a "wide-reaching 'intended effects' test."[55]

b. Subsequent Refinement of the "Effects Test." *Alcoa* stated the effects test but did little to define its operation.[56] The effects test was refined over the thirty-seven years before the FTAIA was enacted, but during that process, confusion arose about its meaning and application.[57] The effects test also escaped the confines of the law of antitrust and was applied in other schemes, including securities litigation[58] and trademark litigation.[59] Judge Becker observed that the extraterritoriality

52. *Id.*

53. *Id.*; *see also* ZWARENSTEYN, *supra* note 19, at 119.

54. Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 612 (9th Cir. 1976), *superseded by statute*, FTAIA of 1982, Pub. L. No. 97-290, tit. IV, 96 Stat. 1246 ("The intent requirement suggested by *Alcoa* . . . is one example of an attempt to broaden the court's perspective . . . .").

55. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1292 (3d Cir. 1979); *see also In re* Uranium Antitrust Litig., 617 F.2d 1248, 1253 (7th Cir. 1980) (noting the "'intended effects' test").

56. *Alcoa*, 148 F.2d at 444.

57. In *Continental Ore*, the Supreme Court affirmed *Alcoa*'s holding that foreign conduct could be challenged in a U.S. court based on effects in domestic commerce. Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704–05 (1962), *superseded by statute*, FTAIA of 1982, Pub. L. No. 97-290, tit. IV, 96 Stat. 1246. In *Continental Ore*, a U.S. company sued U.S. and Canadian defendants claiming exclusionary conduct. *Id.* at 692–93. The lower court directed a verdict for the defendants because the plaintiff's right to compete in the Canadian market was within the authority of the Canadian government. *Id.* at 703. The Supreme Court reversed, rejecting reliance on the *American Banana* rule in favor of a more liberal extraterritoriality standard that emphasized the occurrence of conduct in the United States. *Id.* at 704.

58. *See, e.g.*, Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 988–89 (2d Cir. 1975) (applying Judge Hand's effects test from *Alcoa* in holding that subject matter jurisdiction is available only when the fraudulent acts, relating to securities and committed abroad, result in injury to purchasers or sellers of those securities in whom the United States has an interest); *see also Timberlane*, 549 F.2d at 610–12 (noting the analog between extraterritoriality in the securities arena and in the antitrust arena).

59. *See, e.g.*, Steele v. Bulova Watch Co., 344 U.S. 280, 285–87 (1952) (looking to the effects of defendant's foreign operations within the United States on the question of trademark infringement committed in a foreign country); *see also* McBee v. Delica Co., 417 F.3d 107, 120–21 (1st Cir. 2005) ("The substantial effects test requires that there be evidence of impacts within the United States, and these impacts must be of a sufficient character and magnitude to give the United States a reasonably strong interest in the litigation."); Am. Rice, Inc. v. Ark. Rice Growers Coop. Ass'n, 701 F.2d 408, 413 (5th Cir.

question "has been most frequently litigated" in the context of the Sherman Act, but also recognized courts' grappling in the securities and trademark schemes.[60] In those other arenas, the effects test today retains vitality perhaps to a degree surpassing antitrust, because the FTAIA applies only to antitrust.[61]

3. Procedural Conflict over Comity Considerations. In the late 1970s, in *Timberlane* and *Mannington Mills*, the Ninth and Third Circuits introduced a substantial refinement to the effects test.[62] Both courts held that before a U.S. court heard an antitrust claim involving foreign conduct, the court must balance the interests of the United States in having the claim heard in its courts against the international comity ramifications of doing so.[63] Both rules required courts to consider questions of the extent of conflict with foreign law, the nationality of the parties, the extent to which the foreign state is a superior enforcer, the comparative significance of the effects in one nation versus the other, the foreseeability of an effect on U.S. commerce, and the comparative importance of the policies to be vindicated in the respective countries.[64] The Third Circuit, in *Mannington Mills*, added the following to the Ninth Circuit's *Timberlane* factors: the effect on foreign relations if the U.S. court hears the case, the possibility or impossibility of making the order effective, and the existence of a treaty between the United States and the affected nation speaking to the question.[65]

1983) (analyzing *Timberlane*, *Mannington Mills*, and *Uranium Antitrust* in a case involving extraterritorial application of the trademark laws); *Mannington Mills*, 595 F.2d at 1292 (relying on *Steele* to understand the rationale for the reach of the *Alcoa* test). Although *McBee* was decided many years after the FTAIA was enacted, because the FTAIA does not apply to trademark claims, the case is still instructive as to the operation of the *Alcoa* effects test. *McBee*, 417 F.3d at 120–22.

60. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1161, 1178 & n.33, 1185 (E.D. Pa. 1980).

61. *See* 2 WALLER, *supra* note 3, § 13:23, at 13-61 (stating that the FTAIA limits U.S. jurisdiction of antitrust violations to those occurring in or effecting the United States).

62. *Mannington Mills*, 595 F.2d 1287; *Timberlane*, 549 F.2d 597; *see also* El Cid, Ltd. v. N.J. Zinc Co., 551 F. Supp. 626, 629 n.5 (S.D.N.Y. 1982) (noting the approach of treating comity considerations as part of the extraterritoriality analysis and citing *Timberlane* and *Mannington Mills*); Pierre Vogelenzang, Note, *Foreign Sovereign Compulsion in American Antitrust Law*, 33 STAN. L. REV. 131, 133 (1980) (recognizing an "awareness . . . that courts should weigh foreign regulatory interests . . . when deciding whether to give extraterritorial effect to American antitrust law").

63. *See Mannington Mills*, 595 F.2d at 1297–98 (adopting and refining *Timberlane*'s balancing approach); *Timberlane*, 549 F.2d at 613 (making clear that the United States' interests must be sufficiently strong as compared to other nations' interests in order to justify assertion of extraterritorial authority).

64. *Mannington Mills*, 595 F.2d at 1297–98; *Timberlane*, 549 F.2d at 613–14.

65. *Mannington Mills*, 595 F.2d at 1297–98; *see also* JOELSON, *supra* note 10, at 39

Although both courts employed a fact-based inquiry that commentators have analogized to the "rule of reason" inquiry in substantive antitrust law,[66] the two circuits differed in the

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("*Mannington Mills* . . . somewhat alter[ed] the list of factors to be weighed.").

Those factors, of course, are not cut from whole cloth. They owe their derivation to common-law analysis of foreign relations considerations, which are reflected in the *Third Restatement of Foreign Relations Law*, section 403 of which reads, in pertinent part:

> (2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
>
> (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
>
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
>
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
>
> (d) the existence of justified expectations that might be protected or hurt by the regulation;
>
> (e) the importance of the regulation to the international political, legal, or economic system;
>
> (f) the extent to which the regulation is consistent with the traditions of the international system;
>
> (g) the extent to which another state may have an interest in regulating the activity; and
>
> (h) the likelihood of conflict with regulation by another state.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987). The *Third Restatement* speaks in terms of the "reasonableness" of exercising jurisdiction but notes in the commentary that courts "have applied the principle of reasonableness as a requirement of comity." *Id.* § 403 cmt. a; *see also* KINGMAN BREWSTER, JR., ANTITRUST & AMERICAN BUSINESS ABROAD 446 (1958) (listing six factors: the comparative significance of U.S. conduct to foreign conduct; the intent of the defendant regarding U.S. commerce; comparative seriousness of domestic versus foreign effects; the nationality of the parties; "the degree of conflict with foreign laws"; and "the extent to which conflict can be avoided").

Section 403 and its predecessor, section 18, have been cited and discussed regularly by courts engaging in the antitrust extraterritoriality analysis, both before and after the enactment of the FTAIA. *See Timberlane*, 549 F.2d at 610 & n.18 (citing and discussing RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 18 (1965)); *see also* F. Hoffmann–La Roche Ltd. v. Empagran, 542 U.S. 155, 164–65 (2004) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1986)); Hartford Fire Ins. Co. v. California, 509 U.S. 764, 799 (1993) (same); United States v. Nippon Paper Indus. Co., 109 F.3d 1, 7 (1st Cir. 1997) (same); Laker Airways Ltd. v. Sabena, 731 F.2d 909, 921–23 (D.C. Cir. 1984) (citing RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW § 18 (1965) and RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (Tentative Draft No.2, 1981)). *See generally* Joseph Jude Norton, *Extraterritorial Jurisdiction of U.S. Antitrust and Securities Laws,* 28 INT'L & COMP. L.Q. 575, 597 (1979) (advocating the approach of international comity as codified in the Restatement).

66. *Timberlane* has been read to have created a "jurisdictional rule of reason." *In re* Uranium Antitrust Litig., 617 F.2d 1248, 1255 (7th Cir. 1980) (quoting BREWSTER, JR., *supra* note 65, at 446).

procedural framework they adopted.[67] Under the *Timberlane* rule, the comity analysis was best treated as part of the subject matter jurisdiction inquiry.[68] That court emphasized the jurisdictional implications of the extraterritoriality analysis.[69]

By contrast, in what Judge Becker later called a "tidy framework, easily workable in practice,"[70] the Third Circuit held, in *Mannington Mills*, that considerations of comity and possible repercussions were best addressed as part of a prudential standing inquiry into whether a court should exercise jurisdiction it already possessed.[71] That court easily concluded to its satisfaction "that the district court did have jurisdiction in this case,"[72] relying on the rule from *Zenith Radio Corp. v. Hazeltine Research, Inc.* that "when two American litigants are contesting alleged antitrust activity abroad that results in harm to the export business of one, a federal court does have subject matter jurisdiction."[73] The court then turned (after analyzing the act of state doctrine) to the question of whether the district court *should* exercise jurisdiction.[74]

Likewise, the Seventh Circuit applied the *Mannington Mills* procedural framework and upheld the district court's *In re*

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67. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1161, 1188 (E.D. Pa. 1980) ("The Third Circuit adopted [the Ninth Circuit]'s approach in large part, albeit with a different analytical framework . . . .").

68. *Timberlane*, 549 F.2d at 613; *see also Matsushita*, 494 F. Supp. at 1187–88 (describing the *Timberlane*'s comity analysis as part of the jurisdictional question).

69. *See Mannington Mills*, 595 F.2d at 1301 (Adams, J., concurring) (arguing *Timberlane* stated a comity analysis as part of the subject matter jurisdiction inquiry); Conservation Council of W. Austl., Inc. v. Aluminum Co. of Am., 518 F. Supp. 270, 274–75 (W.D. Pa. 1981) (interpreting *Timberlane* to require the comity analysis as part of the jurisdictional analysis). *Contra* Indus. Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 884 n.7 (5th Cir. 1982) ("Like the Third Circuit majority [in *Mannington Mills*] and the Seventh Circuit [in *Uranium Antitrust*], however, we do not read the *Timberlane* balancing test as a test of subject matter jurisdiction."); *Uranium Antitrust*, 617 F.2d at 1255 (interpreting *Timberlane* as treating the comity consideration as discretionary, to be applied if jurisdiction is found).

70. *Matsushita*, 494 F. Supp. at 1188 n.63.

71. *Mannington Mills*, 595 F.2d at 1294; *see also Matsushita*, 494 F. Supp. at 1188 & n.63 (noting that *Mannington Mills* required considerations of comity and international repercussions as part of a "abstention-style inquiry," rather than in the subject matter jurisdiction inquiry). *Compare* McBee v. Delica Co., 417 F.3d 107, 111 (1st Cir. 2005) (favoring the rule that considerations of comity are best considered as part of the standing inquiry, not a subject matter jurisdiction inquiry), *with* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 798–99 (1993) (stating that the standing inquiry requires a court to determine whether to exercise jurisdiction that it possesses). *See generally* Huffman, *supra* note 2 (manuscript at 29–31) (casting comity in the light of "prudential standing inquiry").

72. *Mannington Mills*, 595 F.2d at 1292.

73. *Id.* (citing Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969)).

74. *Id.* at 1294.

Uranium Antitrust Litigation[75] decision by employing the effects test to find jurisdiction, but considering comity to decide whether to exercise that jurisdiction.[76] *Mannington Mills* and *Uranium Antitrust* anticipated the Supreme Court's approach in *Hartford Fire Insurance Co. v. California*, where the Court noted situations may arise in which international comity would favor a court declining to exercise jurisdiction.[77]

Adding its voice to the choir, in *Industrial Investment Development Corp. v. Mitsui & Co.*, the Fifth Circuit approved comity considerations as part of the extraterritoriality analysis, but introduced further confusion on the procedural basis for the comity consideration.[78] That court rejected the *Timberlane* court's approach to treating comity as a matter of a court's subject matter jurisdiction. "The wide-ranging inquiry suggested by *Timberlane* and its progeny does not fit within *Bell*'s approach to subject matter jurisdiction."[79] But neither did the *Industrial Investment Development* court approve a prudential standing inquiry. It rejected the Seventh Circuit's approach in *Uranium Antitrust* because it disagreed that discretion was inherent in the comity analysis.[80]

The procedural differences in approaches to the comity analysis pre-FTAIA would seem to have tremendous practical importance.[81] On one hand, both the prudential standing question and the subject matter jurisdiction question should be addressed

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75. In *Uranium Antitrust*, the plaintiff, a U.S. corporation, brought a suit against foreign and domestic uranium producers alleging conduct occurring overseas had an effect on U.S. commerce. *In re* Uranium Antitrust Litig., 617 F.2d 1248, 1253–54 (7th Cir. 1980).

76. *Id.* at 1254–56. The factors considered by the district court were narrow and seemingly disconnected from the comity consideration. *Id.* (considering "the complexity of the . . . action; the seriousness of the charges . . . ; and the recalcitrant attitude of the [defendants]").

77. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 798 (1993).

78. *See* Indus. Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 884 & n.7 (5th Cir. 1982) (explaining that jurisdiction is not available if it would violate principles of comity and recognizing confusion over use of the word "jurisdiction"); *see also* Am. Rice, Inc. v. Ark. Rice Growers Coop. Ass'n, 701 F.2d 408, 414 (5th Cir. 1983) (considering factors relevant to comity in the context of extraterritorial application of the trademark laws).

79. *Indus. Inv. Dev.*, 671 F.2d at 884 & n.7 (citing Bell v. Hood, 327 U.S. 678, 682 (1946)).

80. *Id.* at 884 n.7; *see also* Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864, 869–70 (10th Cir. 1981) (stating that the comity question is a subject matter jurisdiction analysis); *Uranium Antitrust*, 617 F.2d at 1255.

81. *See* Aidan Robertson & Marie Demetriou, *"But That Was in Another Country . . .": The Extra-Territorial Application of the US Antitrust Laws in the US Supreme Court*, 43 INT'L & COMP. L.Q. 417, 420–21 (1994) (observing that this distinction could greatly expand extraterritorial reach of the Sherman Act and noting that no court has refused jurisdiction solely on comity grounds).

at the beginning of the litigation, before a court proceeds to the merits of the case.[82] But unlike the subject matter jurisdiction question, the prudential standing question is waivable.[83] That distinction is important. Under a prudential standing test, litigation can proceed when the investment by the plaintiff and the judicial system exceeds the harm associated with proceeding in what, *ab initio*, might be found an inappropriate forum.[84] If, as all the multifactor comity tests recognize, the importance to the United States of regulating the particular conduct is a relevant question, no reason exists why that factor could not acquire controlling weight once the investment in litigation has achieved sufficient magnitude.

The Ninth and Third circuits' different procedural approaches also explain subtle differences in their substantive rules. The factors considered under the *Timberlane* jurisdictional approach are fewer than in the *Mannington Mills* standing approach.[85] The *Timberlane* factors concentrate on concerns such as the relative robustness of compensation and deterrence in the competing jurisdictions.[86] The additional *Mannington Mills* factors speak, instead, more directly to the long term effect of extraterritorial enforcement on commerce.[87]

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82. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 416 (2004) (Stevens, J., concurring) (suggesting that in any complex case, the court should first look to see whether plaintiff has standing); Hairston v. Pac. 10 Conference, 101 F.3d 1315, 1320–21 (9th Cir. 1996) (Trott, J., concurring) (standing is a threshold issue); *Indus. Inv. Dev.*, 671 F.2d at 886 (standing must be determined from the pleadings).

83. *See, e.g.*, *Uranium Antitrust*, 617 F.2d at 1255 (affirming the district court's discretion in determining prudential standing).

84. *See* Huffman, *supra* note 2 (manuscript at 51). The Ninth and Third circuits' different procedural approaches also explain subtle differences in their substantive rules. The factors considered under the *Timberlane* jurisdictional approach are fewer than in the *Mannington Mills* standing approach. The *Timberlane* factors concentrate on concerns including the relative robustness of compensation and deterrence in the competing jurisdictions. *See* Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 613 (9th Cir. 1976), *superseded by statute*, FTAIA of 1982, Pub. L. No. 97-290, tit. IV, 96 Stat. 1246. The additional *Mannington Mills* factors speak, instead, more directly to the concerns for stepping on toes of trading partners through extraterritorial enforcement. *See* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1291–92 (3d Cir. 1979).

85. *Compare Timberlane*, 549 F.2d at 614 (laying out seven factors that should be weighed while deciding whether extraterritorial jurisdiction of the United States should be asserted), *with Mannington Mills*, 595 F.2d at 1297–98 (agreeing with *Timberlane*, but listing instead ten different factors to be considered in making the same determination).

86. *See Timberlane*, 549 F.2d at 614 (listing, for example, "the extent to which enforcement by either state can be expected to achieve compliance").

87. *See Mannington Mills*, 595 F.2d at 1297–98 (supplementing the *Timberlane* list with factors such as the "[p]ossible effect upon foreign relations if the court exercises jurisdiction and grants relief").

As an empirical matter, though, it is difficult to find in the cases any practical effect owed to the differences between the substantive and procedural rules governing the pre-FTAIA effects test.[88] For example, the Seventh Circuit in *Uranium Antitrust* read the *Timberlane* rule as requiring a discretionary comity consideration following the jurisdictional inquiry.[89] Even in Judge Becker's careful analysis for the Eastern District of Pennsylvania in *Zenith Radio Corp. v. Matsushita Electric Industrial Co.* of the history of the effects test and the differences between *Mannington Mills* and *Timberlane*, the court—although bound by *Mannington Mills*' treatment of comity considerations as a standing inquiry—ultimately determined that its responsibility was to determine the extent of its subject matter jurisdiction over claims against foreign defendants.[90]

Both the D.C. Circuit in *Laker Airways Ltd. v. Sabena*[91] and the Second Circuit in *National Bank of Canada v. Interbank Card Association*[92] declined to apply the comity-driven approach followed by the Ninth and Third Circuits, and approved by the Fifth and Seventh Circuits.[93] According to the D.C. Circuit, the

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88. According to the D.C. Circuit in *Laker Airways*, *Ltd. v. Sabena*, "[a] pragmatic assessment of those decisions adopting an interest balancing approach indicates *none where United States jurisdiction was declined* when there was more than a *de minimis* United States interest." Laker Airways Ltd. v. Sabena, 731 F.2d 909, 950–51 & n.156 (D.C. Cir. 1984) (noting that in *National Bank of Canada v. Interbank Card Ass'n*, 666 F.2d 6, 9 (2d Cir. 1981), *Montreal Trading Ltd. v. Amax, Inc.*, 661 F.2d 864, 870 (10th Cir. 1981), *Vespa of America Corp. v. Bajaj Auto Ltd.*, 550 F. Supp. 224, 229 (N.D. Cal. 1982), and *Conservation Council of W. Australia., Inc. v. Aluminum Co. of America*, 518 F. Supp. 270, 276 (W.D. Pa. 1981), the courts uniformly held the effects were not sufficient to come within the purview of the antitrust laws rather than declining to exercise jurisdiction as a matter of balancing the comity factors).

The differences would be procedural in nature. The subject matter jurisdiction question is not waivable, while the standing question can be waived. *See, e.g.*, Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982). The Fifth Circuit in *Industrial Investment Development* identified another practical implication of the procedural question: placing *discretionary* determinations within the jurisdictional analysis would remove that discretionary decision from review on appeal—an unacceptable outcome in the Fifth Circuit's view. Indus. Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 884 n.7 (5th Cir. 1982).

89. *In re* Uranium Antitrust Litig., 617 F.2d 1248, 1255 (7th Cir. 1980). *Contra Conservation Council of W. Austl.*, 518 F. Supp. at 275 (interpreting *Timberlane* to require the comity analysis as part of the jurisdictional analysis).

90. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1161, 1187–89 (E.D. Pa. 1980).

91. *Laker Airways, Ltd.*, 731 F.2d 909. *Laker Airways* involved a "defensive preliminary injunction," in which the plaintiff sought to enjoin defendants' overseas action, which in turn was intended to preclude the plaintiffs' suit in a U.S. antitrust court. *Id.* at 916, 920–21.

92. *Nat'l Bank of Can.*, 666 F.2d 6.

93. *See Laker Airways, Ltd.*, 731 F.2d at 934 ("Although one state may exercise its prescriptive jurisdiction to create an 'exclusive' remedy for an injury, absent some other

Timberlane factors were inapplicable to a circumstance in which two sovereigns each legitimately could exercise jurisdiction over the conduct.[94] In *National Bank of Canada*, the Second Circuit did not need to apply the *Timberlane* factors to conclude, based on the antitrust injury rule from *Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc.*,[95] that the "actionable aspect of the restraint, the anticompetitive effect, is felt only within the foreign market in which the injured plaintiff seeks to compete."[96]

B. Congress's Response: The FTAIA

Congress's purposes in enacting the FTAIA were three-fold. First, the FTAIA is protectionist legislation.[97] Congress sought to

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overriding constitutional stricture, that exclusivity is never so total as to prevent another sovereign from disregarding a foreign remedy in favor of its own administrative scheme tailored to serve its unique needs."); *see also Indus. Inv. Dev.*, 671 F.2d at 884 & n.7 (borrowing the reasoning from *Mannington Mills* and *Timberlane*); *Uranium Antitrust*, 617 F.2d at 1254–55 (providing the Seventh Circuit's perspective); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1290 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 612–15 (9th Cir. 1976), *superseded by statute*, FTAIA of 1982, Pub. L. No. 97-290, tit. IV, 96 Stat. 1246.

94. *Laker Airways, Ltd.*, 731 F.2d at 948–49 & nn.145–46 (rejecting application of factors from the *Third Restatement*, *Timberlane*, and *Mannington Mills*); *id.* at 950 & nn.153–54 (arguing that the *Timberlane* and *Mannington Mills* comity balancing approach "has not gained more than a temporary foothold in domestic law" and has been rejected by courts, including the Second Circuit, as well as scholars); *see also* Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310, 1323–25 (1985) (criticizing balancing tests such as those from *Timberlane* and *Mannington Mills* as inherently unfaithful to the principle of comity). *But see Laker Airways, Ltd.*, 731 F.2d at 956 (Starr, J., dissenting) (stating that even though the application of the principles of comity may be difficult, United States courts are required to recognize the interests of another sovereign in appropriate circumstances); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(3) (1987) (establishing that where two sovereigns may exercise legitimate jurisdiction in a case, the state with the lesser interest should defer).

The *Laker Airways* court took issue with the very term "extraterritoriality," arguing that where the standards for the assertion of adjudicative authority were met, the application of the U.S. antitrust laws was not extraterritorial at all. *See Laker Airways, Ltd.*, 731 F.2d at 923; *see also* W.L. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 20 (1958); ZWARENSTEYN, *supra* note 19, at 139 (concluding the wrong occurs where the injury occurs—a conclusion that, if robust, reconciles the *American Banana* "conduct" approach with the modern "effects" approach). Of course, that view presumes the conclusion that the court is not overreaching. *See* ZWARENSTEYN, *supra* note 19, at 129–30 (describing Fugate's statement as "euphamistic").

95. Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc., 429 U.S. 477, 489 (1977).

96. *Nat'l Bank of Can.*, 666 F.2d at 8.

97. On the protectionist potential for competition policy generally, see Paul B. Stephan, *Global Governance, Antitrust, and the Limits of International Cooperation*, 38 CORNELL INT'L L.J. 173, 182 (2005) ("Modern trade theory offers strong support for specific uses of competition rules to protect domestic producers."). *But see* Wood, *supra* note 10, at xiv ("Sometimes observers wonder if nationalistic considerations influence enforcement decisions. My personal view is that the answer is 'no. . . .' [T]he laws are not written that way and in general are not enforced that way.").

alleviate the concern "that American antitrust laws are a barrier to joint export activities that promote efficiencies in the export of American goods and services."[98] When the FTAIA was enacted in 1982, U.S. antitrust laws were substantially more robust than most foreign antitrust regimes.[99] Also, the effects of plaintiff-friendly Warren Court precedents remained significant.[100] Second, the FTAIA was designed to alleviate tension between the United States and its trading partners arising from extraterritorial application of U.S. competition policy in conflict with foreign competition law.[101] Third, Congress recognized the confusion resulting from differences among lower courts "in their expression[s] of the proper test for determining whether U.S. antitrust jurisdiction over international transactions exists."[102]

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98. H.R. REP. NO. 97-686, at 2 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2487; *see also* Wood, *supra* note 10, at xiv (acknowledging that export control exceptions "can be explained only by a lack of concern for the welfare of foreign consumers").

99. *See* William E. Kovacic, *Extraterritoriality, Institutions, and Convergence in International Competition Policy*, 97 AM. SOC'Y INT'L L. PROC. 309, 309 (2003) (describing the U.S. competition regime as the only effective regime several decades ago, and noting that despite the rampant growth of the number of antitrust regimes, "many antitrust laws still lack effective implementation"); Jonathan T. Schmidt, *Keeping U.S. Courts Open to Foreign Antitrust Plaintiffs: A Hybrid Approach to the Effective Deterrence of International Cartels*, 31 YALE J. INT'L L. 211, 223 (noting that, in part, the FTAIA intended "to allow U.S. firms to profit from other countries' less stringent competition laws"). *But compare* William E. Kovacic, *Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels*, 69 GEO. WASH. L. REV. 766, 789–90 (2001) (detailing developments in U.S. antitrust laws), *with Foreign Trade Antitrust Improvements Act: Hearings on H.R. 2326 Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary*, 97th Cong. 79 (1981) [hereinafter *FTAIA Hearings*] (statement of John Shenefield, Partner, Milbank, Tweed, Hadley & McCloy) ("The German merger law in some ways is far more aggressive than ours. The European Community antitrust acts reach out in a way we would be unlikely to.").

Joelson notes that economic philosophy consistent with modern antitrust sentiment existed as early as Aristotle, and Roman antitrust legislation was in effect in 50 B.C. JOELSON, *supra* note 10, at 1. Common law principles were developed in England in the 13th Century. *Id.* Canada's initial national antitrust legislation was passed in 1889, a year before the Sherman Act in 1890. *See* Michael Bliss, *Another Anti-trust Tradition: Canadian Anti-Combines Policy, 1889–1910*, 47 BUS. HIST. REV. 177, 177 (1973). During the twentieth century, however, development of robust antitrust policy was occurring in the United States at times when foreign governments "encouraged the development of strong business forces even if that entailed the creation of cartels or monopolies." JOELSON, *supra* note 10, at 3–4.

100. *See* BORK, *supra* note 6, at 17 (observing that the advancement of small business welfare was a dominant antitrust goal during the era of the Warren Court); RICHARD A. POSNER, ANTITRUST LAW 46 (2d ed. 2001) (1976) (identifying 1962 as the peak of private antitrust suits leading to large awards in private damages).

101. *See, e.g.*, *FTAIA Hearings*, *supra* note 99, at 2 (statement of Rep. Peter W. Rodino, Jr., Chairman, H. Comm. on the Judiciary) ("Some foreign animosity toward U.S. antitrust enforcement might also be eliminated, because the domestic-effects standard being proposed would limit the reach of our antitrust laws in a manner consistent with our major trading partners.").

102. H.R. REP. NO. 97-686, at 2; *see also* O.N.E. Shipping Ltd. v. Flota Mercante

1. Protectionist Intent and Effect. Although fear of antitrust liability naturally flows from uncertainty over the scope of enforcement, Congress's response to the perceptions of the business community in 1982 is properly separated from that constituency's confusion over the standards followed in applying the effects test.[103] Congress recognized that the perception of the antitrust laws hindering export activity was false or overstated.[104] "Some testimony in the hearing record suggests that the United States is doing well as an exporter and that whatever problems that might exist are not caused by our antitrust laws."[105] "[T]he three government policies that most discourage U.S. exports are taxation of Americans employed abroad, uncertainties about enforcement of the Foreign Corrupt Practices Act, and export control regulations."[106]

Instead, Congress's approach was protectionist. The effect was to prefer U.S. businesses and consumers to foreign businesses and consumers because the FTAIA permits only U.S. exporters to sue to remedy harm to competition that occurred in U.S. export commerce—giving license for U.S. exporters to engage in conduct causing harm felt only in foreign commerce.[107]

Grancolombiana, 830 F.2d 449, 451 (2d Cir. 1987) ("In an effort to provide a single standard to determine whether American antitrust laws apply to a given extraterritorial transaction, Congress enacted the [FTAIA]."); Edward D. Cavanagh, *The FTAIA and Subject Matter Jurisdiction over Foreign Transactions Under the Antitrust Laws: The New Frontier in Antitrust Litigation*, 56 SMU L. REV. 2151, 2158 (2003) (noting two purposes of "limit[ing] the antitrust exposure of American exporters" and "clarify[ing] the jurisdictional reach of the Sherman Act"); Kevin O'Malley, Note, *Does U.S. Antitrust Jurisdiction Extend to Claims of Independent / Dependent Foreign Injury?*, 20 TEMP. INT'L & COMP. L.J. 219, 222 (2006) (articulating the same two rationales).

103. *See* H.R. REP. NO. 97-686, at 2 (identifying the two as separate problems that the Act intends to address).

104. *See id.* (describing as "at best speculative" claims that antitrust laws have any negative impact on exports and asserting that the Act cannot be a cure-all for every problem afflicting exports).

105. *Id.* at 4.

106. *Id.*

107. *See* 15 U.S.C. § 6a (2000) (allowing U.S. exporters to bring a monopolization claim); H.R. REP. NO. 97-686, at 4 (stating that a remedy for harm in export commerce is only available for impact on "commerce within the United States or a domestic firm competing for foreign trade"). This protectionist effect is especially marked because of the FTAIA's requirement that there be a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce, which will operate to preclude suits alleging a spillover effect in U.S. commerce. 15 U.S.C. § 6a(1) (2000); H.R. REP. NO. 97-686, at 8–9. *But see* H.R. REP. NO. 97-686, at 13 (predicting that the spillover effect in U.S. commerce from export cartels is likely to be "direct, substantial, and reasonably foreseeable"). "[E]xport cartels are a well-known exception to the ukase against cartels." Keith R. Fisher, *Transparency in Global Merger Review: A Limited Role for the WTO?*, 11 STAN. J.L. BUS. & FIN. 326, 377 n.211 (2006) (citing Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 397 (1997)); *see also* Diane P. Wood, *The U.S. Antitrust Laws in a Global Context*, 2004 COLUM. BUS. L. REV. 265, 267 (noting the problem of

The FTAIA therefore "provides a potential safe harbor for virtually any export transaction which does not affect the U.S. domestic market or the business opportunities of other U.S. exporters."[108]

The protectionist effect almost surely was purposeful. The legislative history concentrates wholly on export commerce and the finding of ways to ease antitrust burdens on U.S. exporters.[109] The "Declaration of Purpose" statement of the Export Trading Company Act of 1982,[110] of which the FTAIA is Title IV, related the importance of exports to the following: job creation and U.S. economic growth;[111] the concerns for trade deficits;[112] the failure of small business to engage in sufficient export business;[113] the ineffectiveness of agricultural export efforts;[114] the failure of U.S. exporters to achieve sufficient economies of scale;[115] and the concern that government regulation was the reason for insufficient export activity by U.S. business.[116] The purpose of the Export Trading Company Act was to make a four-pronged attack on the perceived problems with U.S. export trade.[117] One prong was the "modif[ication of] the application of the antitrust laws to certain export trade."[118] "The purpose of the law was to exempt

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"legally tolerated export cartels").

108. 1 WALLER, *supra* note 3, § 9:7, at 9-12.

109. *See, e.g.*, H.R. REP. NO. 97-686, at 2 ("H.R. 5235 is one of several bills . . . that seek[s] to promote American exports."); *id.* at 4 ("'[I]t is an article of orthodoxy in the business community that the antitrust laws stand as an impediment to the international competitive performance of the United States.'" (quoting the statement of former Assistant Attorney General for Antitrust John Shenefield)); *id.* at 5–6 (noting "a second, related problem [of] possible ambiguity in the precise legal standard to be employed in determining whether American antitrust law is to be applied," which causes undue caution by exporters).

110. Export Trading Company Act of 1982, Pub. L. No. 97-290, tit. I, § 101, 96 Stat. 1233, 1233 (codified at 15 U.S.C. §§ 4001–4003 (2000)).

111. 15 U.S.C. § 102(a)(1), (2) (2000).

112. 15 U.S.C. § 102(a)(3) (2000).

113. 15 U.S.C. § 102(a)(4) (2000).

114. 15 U.S.C. § 102(a)(5) (2000).

115. 15 U.S.C. § 102(a)(7) (2000).

116. 15 U.S.C. § 102(a)(8) (2000).

117. 15 U.S.C. § 102(b) (2000).

118. *Id.* If the goal of the legislation had been primarily to settle "[b]usiness perception that antitrust laws prohibit legitimate joint activity," H.R. REP. NO. 97-686, at 4 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2489, the FTAIA and its analog in the Federal Trade Commission Act would have been almost wholly superfluous to amendments to section 7 of the Clayton Act. Also part of the Export Trading Company Act of 1982 amendments to section 7 were drafted broadly, with the purpose of exempting joint venture activity—including "incidental" activity—from the restrictions of section 7. *Id.* at 12; *see also* 1 WALLER, *supra* note 3, § 9:7, at 9-9 (citing 15 U.S.C. §§ 4011–4021 (2000)). However, as Professor Waller has also noted, the FTAIA is more relied on than the "formal immunity provisions available for export conduct." 1 WALLER, *supra* note 3,

collective export activities from the provisions of the Sherman Act and the Federal Trade Commission Act."[119]

Any Congressional concern for foreign injury arises almost wholly in the context of concern for insufficient deterrence of conduct with a domestic effect.[120] Citing the rationale underlying the Supreme Court's 1978 *Pfizer, Inc. v. Government of India* opinion,[121] the House Report stated that "to deny foreigners a recovery could under some circumstances so limit the deterrent effect of U.S. antitrust law that defendants would continue to violate our laws."[122] In contrast to a common law extraterritoriality analysis, no concerns are expressed for potential harm to foreign consumers or the exporting of bad conduct occurring within the United States.[123]

2. Mitigating International Tension. Judge Starr wrote in 1984, "[a] tempest has been brewing for some time among the nations as to the reach of this country's antitrust laws."[124] Early in the hearings that spread over both sessions of the 97th Congress, before the FTAIA was passed in October 1982, Congressman Rodino recognized the international tension caused by exporting U.S. competition policy.[125] Congressman Rodino noted that "many of our closest allies and trading partners resent the extraterritorial reach of our antitrust laws."[126] The international tension was not merely theoretical. For example, the United Kingdom had enacted legislation precluding the

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§ 9:7, at 9-13.

119. JOELSON, *supra* note 10, at 40.

120. *See* H.R. REP. NO. 97-686, at 10 (stating that conduct having the requisite domestic affects gives rise to a cause of action for both foreign and domestic purchasers); *see also* O'Malley, *supra* note 102, at 224 ("[Where] a large cartel might create a spillover effect in which inflated prices in foreign markets would have the effect of raising domestic prices[,] . . . such an impact would more than likely meet the direct, substantial, and reasonably foreseeable effect on domestic commerce.").

121. Pfizer, Inc. v. Gov't of India, 434 U.S. 308 (1978).

122. H.R. REP. NO. 97-686, at 10.

123. *Cf.* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 987 (2d Cir. 1975) ("Congress did not mean the United States to be used as a base for fraudulent securities schemes even when the victims are foreigners, at least in the context of suits by the SEC or by named foreign plaintiffs.").

124. Laker Airways Ltd. v. Sabena, 731 F.2d 909, 958 (D.C. Cir. 1984) (Starr, J., dissenting).

125. *FTAIA Hearings*, *supra* note 99, at 1 (statement of Rep. Peter W. Rodino, Jr., Chairman, H. Comm. on the Judiciary) (observing that some of our closest allies "have even enacted laws to block our enforcement efforts"); *see also* Wood, *supra* note 10, at xi ("It would be difficult to overstate the sense of outrage [U.S. antitrust extraterritoriality] provoked in many countries . . . .").

126. *FTAIA Hearings*, *supra* note 99, at 1 (statement of Rep. Peter W. Rodino, Jr., Chairman, H. Comm. on the Judiciary).

enforcement of judgments obtained under U.S. antitrust laws.[127] Mitigating international tension became a theme occupying much attention through the development of what became the FTAIA. According to Professor Eleanor Fox of New York University, "[w]e do not, and should not seek, thus to export American antitrust."[128]

But empirical evidence gathered shortly before the FTAIA's enactment concluded that America was indeed exporting.[129] In *Timberlane*, Judge Choy noted that "[i]n actual litigation, jurisdiction has not often been found lacking. Up to May 1973, the Department of Justice filed some 248 foreign trade antitrust cases; not one was lost for want of jurisdiction over the activities claimed to violate the law."[130] Private actions fared nearly as well: "reported dismissals of [private] cases also appear to be infrequent. The only case lost on appeal on this ground was *American Banana* . . . ."[131] Despite this record of success in litigation, it was well understood that "[e]xtraterritorial application [of the U.S. antitrust laws] is understandably a matter of concern for the other countries involved."[132] For example, foreign governments were filing briefs as amici challenging the extraterritorial application of U.S. antitrust laws, and raising questions in particular about the *Alcoa* effects test.[133] *Alcoa* and its progeny were "attacked as being in violation of the principles of

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127. Protection of Trading Interests Act, 1980, c. 11, § 1 (Eng.); *see also Laker Airways, Ltd.*, 731 F.2d at 946 (describing the British legislation as one indication of the British Government's objection to the scope of extraterritorial application of the U.S. antitrust laws).

Judge Starr, dissenting in *Laker Airways, Inc.*, noted that the tension between the United Kingdom and the United States was of particular concern because "we inherited so much of our legal system" from the United Kingdom. *Id.* at 959 (Starr, J., dissenting).

128. *FTAIA Hearings*, *supra* note 99, at 27 (testimony of Professor Eleanor Fox, Professor of Law, New York University).

129. *See* Peter D. Trooboff, *International Decisions*, 83 AM. J. INT'L L. 918, 929 (1989) (noting "[t]he storm of controversy evoked by U.S. efforts during the 1970s to bring antitrust cases for transnational conduct").

130. Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 608 n.12 (9th Cir. 1976), *superseded by statute*, FTAIA of 1982, Pub. L. No. 97-290, tit. IV, 96 Stat. 1246 (citing FUGATE, *supra* note 94, app. B at 498).

131. *Id.* (citing James A. Rahl, *Foreign Commerce Jurisdiction of the American Antitrust Laws*, 43 ANTITRUST L.J. 521 (1974)). This was likely because "the litigated cases have involved relatively obvious offenses and rather significant and apparent effects on competition within the United States." *Id.* at 611 (citing PHILLIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS 129 n.455 (3d ed. 1974); Rahl, *supra*, at 523).

132. *Id.* at 609.

133. *See, e.g.*, *In re* Uranium Antitrust Litig., 617 F.2d 1248, 1254 (7th Cir. 1980) (noting that "amici, in particular the United Kingdom contend that *Alcoa* is no longer to be accepted by United States Courts as settled law" (internal quotation marks omitted)).

international law."[134] The FTAIA was Congress's attempt to address the concerns of foreign governments about perceived overreaching by U.S. antitrust courts.[135]

3. Resolving Confusion over the Effects Test. Citing "[u]ncertainty in the [v]erbal [f]ormulation of the [n]ature and [q]uantum of [e]ffects [t]hat [a]re [n]ecessary [t]o [c]reate [j]urisdiction [u]nder the [a]ntitrust [l]aws," Congress referenced what it viewed to be multifarious formulations of the *Alcoa* effects test that had cropped up among the circuits and in the Department of Justice Guidelines.[136] Among *Timberlane*, *Mannington Mills*, *National Bank of Canada*, and trial court cases in the Southern District of New York and the Eastern District of Pennsylvania, six variations on the *Alcoa* rule had emerged.[137] Other cases, not discussed in the legislative history, followed an effects test with slightly different phraseology.[138]

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134. ZWARENSTEYN, *supra* note 19, at 121–22 (citing IVO E. SCHWARTZ, DEUTSCHES INTERNATIONALES KARTELLRECHT 245 (1962)); *see also* JOELSON, *supra* note 10, at 38–39 (noting that the *Alcoa* rule "prompted much outcry from foreign nations at this 'extraterritorial' imposition of U.S. antitrust law").

The corollary concern is for reactionary overreaching by foreign courts that has the effect of regulating U.S. commerce. Just as American law may be unpalatable to a foreign sovereign, the foreign sovereign's laws may be unpalatable to the American scheme. *See, e.g.*, WILLIAM HOWARD TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT 115–16 (Fred B. Rothman & Co. 1993) (1914) (discussing the law in Australia, "the home of radicalism and fads and nostrums on the subject of trade restraints"). The concerns for conflict bear more weight if the various legal schemes conflict, than if they converge. *See* ZWARENSTEYN, *supra* note 19, at 99–100.

135. *See* Laker Airways Ltd. v. Sabena, 731 F.2d 909, 946 & n.137 (D.C. Cir. 1984) (describing the FTAIA as a "limited exception[ ]" to Congress's failure to take action to address the international concerns).

136. H.R. REP. NO. 97-686, at 5 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2490; *see also* JOELSON, *supra* note 10, at 40 ("[S]ome commentators labeled the *Timberlane* doctrine and its ilk as being 'uncounselable law,' *i.e.*, they questioned whether a lawyer striving to counsel a business person on legal compliance under the jurisdictional rule of reason could fairly anticipate what conclusion a court would subsequently reach . . . .").

137. H.R. REP. NO. 97-686, at 5 (citing Nat'l Bank of Can. v. Interbank Card Ass'n, 666 F.2d 6, 9 (2d Cir. 1981); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 605 (9th Cir. 1976), *superseded by statute*, FTAIA of 1982, Pub. L. No. 97-290, tit. IV, 96 Stat. 1246; Waldbaum v. Worldvision Enters., Inc., 84 F.R.D. 95, 95–98 (S.D.N.Y. 1978); Industria Siciliana Asfalti, Bitumi, S.P.A. v. Exxon Research & Eng'g Co., No. 75 Civ. 5828-CSH, 1977 WL 1353, at *11 (S.D.N.Y. Jan. 18, 1977); Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc., 383 F. Supp. 586, 587 (E.D. Pa. 1974)).

138. *See, e.g.*, *Timberlane*, 549 F.2d at 610 (assessing the district court's application of a "direct and substantial effect" test (internal quotation marks omitted)). According to Judge Choy in *Timberlane*, "[t]he same [direct and substantial effects] formula was employed, to some extent, by the district courts in [*United States v. Swiss Watchmakers of Switzerland Info. Ctr., Inc. (Swiss Watchmakers)*, 1963 Trade Cas. ¶ 70,600 (S.D.N.Y. Dec. 20, 1962),] in *United States v. R.P. Oldham Co.*, 152 F. Supp. 818, 822 (N.D. Cal. 1957), and in [*United States v.*] *General Electric* [*Co.*], 82 F. Supp. [753, 891 (D.N.J. Jan.

None of those courts had adopted the Department of Justice's formulation in the *Antitrust Guide to International Operations* that the U.S. antitrust laws apply "'when there is a substantial and foreseeable effect on the U.S. commerce.'"[139] "Dean Rahl observe[d] '[t]here is no agreed black-letter rule articulating the Sherman Act's commerce coverage' in the international context."[140]

It is doubtful the 97th Congress correctly perceived the state of confusion that had arisen in the regulated community regarding the reach of the effects test.[141] Initially, the reliance in House Report 686 on decisions from the Southern District of New York and the Eastern District of Pennsylvania as examples of the confused state of the law ignores that those cases came from circuits—the Second and the Third—that had made authoritative pronouncements on the application and interpretation of the *Alcoa* rule.[142] One such pronouncement, in the Third Circuit's *Mannington Mills* decision, substantively—although not as a matter of procedure[143]—was very close to the Ninth Circuit's

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19, 1949)]." *Id.*

The Fifth Circuit had a different formulation—"[a] restraint that directly *or* substantially affects the flow of commerce into or out of the United States is within the scope of the Sherman Act." Indus. Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 883 (5th Cir. 1982) (emphasis added); *see also* Dominicus Americana Bohio v. Gulf & W. Indus., Inc., 473 F. Supp. 680, 687 (S.D.N.Y. 1979) ("Indeed, it is probably not necessary for the effect on foreign commerce to be both substantial and direct, as long as it is not *de minimis*.").

139. H.R. REP. NO. 97-686, at 5 (quoting U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE TO INTERNATIONAL OPERATIONS 6–7 (1977)). According to one witness before the House Judiciary Committee, "[t]he uncertainty that exists today . . . is the result of two standards, one for private actions and a different standard set forth as the current enforcement policy of the Justice Department in its Antitrust Guide for International Operations." *FTAIA Hearings*, *supra* note 99, at 38 (remarks of David N. Goldsweig, Attorney, General Motors Corp.).

140. *Timberlane*, 549 F.2d at 611 (quoting Rahl, *supra* note 131, at 611). One commentator noted that before the FTAIA, the effects test had devolved into several forms, including an "effects only test, a direct or substantial effects test, a direct and substantial effects test, and a some effects, regardless of whether they are intended or substantial, test." *See* Murphy, *supra* note 1, at 806 (footnotes omitted).

141. *Cf.* TAFT, *supra* note 134, at 96 (arguing that judicial interpretations of the Sherman Act are effective in providing notice of illegality to members of the regulated community).

142. *See Nat'l Bank of Can.*, 666 F.2d at 8 (concluding that the inquiry should be "whether the challenged restraint has, or is intended to have, any anticompetitive effect"); *Mannington Mills*, 595 F.2d at 1292 (commenting that a court has jurisdiction when harm to the export business of an American litigant occurs).

143. *See supra* notes 66–71 and accompanying text (comparing *Timberlane*, in which the comity analysis was part of the subject matter jurisdiction inquiry, with *Mannington Mills*, in which the comity analysis was part of a prudential standing inquiry).

Timberlane formulation, which had received significant notice and discussion among the courts.[144]

Also, Congress recognized that "[t]he precise effect of these varying formulations [of the effects test] is disputed."[145] A report of the ABA Antitrust Section, cited in the House of Representatives Report, concluded—probably correctly—that the differential wording of courts' tests had little practical effect.[146] For example, concentrating on the degree of nexus between a domestic effect and foreign harm—one of the areas of confusion under the modern extraterritoriality analysis[147]—the Ninth Circuit's *Timberlane* test required a demonstration of a link between the plaintiff's injury and an impact on U.S. commerce for jurisdiction.[148] Likewise, in *Industria Siciliana Asfalti, Bitumi, S.P.A. v. Exxon Research & Engineering Co.*, a case decided two years prior to *Timberlane* that was listed as one of the supposed conflict cases, the Southern District of New York relied on a connection between the foreign plaintiff's harm and an effect on U.S. commerce to uphold jurisdiction over the plaintiff's claim.[149] Perhaps for those reasons, one witness at the hearings testified, "It has never been shown that antitrust is a significant disincentive to exports . . . ."[150]

Emphasizing an area of ostensible but insubstantial confusion, Congress failed to account for the confusion that time has proved to be of more significant importance: courts' differing views on the injection of comity principles into the extraterritoriality analysis. Those differing views were in their

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144. *Compare Timberlane*, 549 F.2d at 613 (finding that a tripartite analysis requiring some effect on foreign commerce, a cognizable injury, and a determination of the international setting was necessary), *with Mannington Mills*, 595 F.2d at 1292 (requiring a substantial effect on foreign commerce).

145. H.R. REP. NO. 97-686, at 5 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2490; *cf.* Note, *American Adjudication of Transnational Securities Fraud*, 89 HARV. L. REV. 553, 563 (1976) ("Although the courts have spoken in the terms of the *Restatement* and of congressional policy, findings that an American effect was direct, substantial, and foreseeable, or within the scope of congressional intent, have little independent analytic significance. Instead, cases appear to turn on a reconciliation of American and foreign interests in regulating their respective economies and business affairs . . . .").

146. H.R. REP. NO. 97-686, at 5–6.

147. *See infra* Part III.B (illustrating the confusion surrounding the requisite nexus between foreign and domestic effects); Huffman, *supra* note 2 (manuscript at 43–48).

148. *See Timberlane*, 549 F.2d at 613.

149. Industria Siciliana Asfalti, Bitumi, S.P.A. v. Exxon Research & Eng'g Co., No. 75 Civ. 5828-CSH, 1977 WL 1353, at *11 (S.D.N.Y. Jan. 18, 1977) (upholding jurisdiction where the plaintiff was injured and the export of design and engineering services was restrained).

150. *FTAIA Hearings*, *supra* note 99, at 27, 28 (testimony of Professor Eleanor Fox, Professor of Law, New York University).

incipiency in 1982: the Ninth Circuit's *Timberlane* rule stated the dominant approach favoring judicial balancing of comity concerns.[151] This rule had been followed, but changed in important respects, by the Third Circuit in *Mannington Mills* and had been rejected by the Second Circuit in *National Bank of Canada* and the D.C. Circuit in *Laker Airways*.[152] Congress's failure to recognize the importance of that area of confusion explains the lack of attention paid in the FTAIA to the application of international comity principles. The issue was left unaddressed in the statute and has become the crux of recent FTAIA litigation.[153]

4. The Result. The FTAIA codified a version of the *Alcoa* effects test. Rejecting *American Banana*'s bright-line approach, courts—most notably the Second Circuit in *Alcoa*[154]—held that if the extraterritorial conduct has a sufficient effect on U.S. commerce, a U.S. court will assert jurisdiction over an antitrust claim arising from that conduct.[155] With the FTAIA, Congress

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151. *See Timberlane*, 549 F.2d at 613–15.

152. *See* Laker Airways Ltd. v. Sabena, 731 F.2d 909, 915–16 (D.C. Cir. 1984) ("Accession to a demand for comity predicated on the coercive effects of a foreign judgment usurping legitimately concurrent prescriptive jurisdiction is unlikely to foster the processes of accommodation and cooperation which form the basis for a genuine system of international comity."); Nat'l Bank of Can. v. Interbank Card Ass'n, 666 F.2d 6, 8 (2d Cir. 1981) (rejecting *Timberlane*'s comity considerations, balancing and stating that jurisdiction is possible only with an appreciable anticompetitive effect on this country's commerce); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1292 (3d Cir. 1979) (stating that when the practices of an American citizen abroad have a substantial effect on American foreign commerce, the Sherman Act applies). *But see* O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, 830 F.2d 449, 451 (2d Cir. 1987) ("The comity balancing test [of *Timberlane* and *Mannington Mills*] has been explicitly used by this Court.") (citing Joseph Muller Corp. Zurich v. Societe Anonyme de Gerance et D'Armement, 451 F.2d 727 (2d Cir. 1971)).

153. *See* 15 U.S.C. § 6a (2000).

154. United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416 (2d Cir. 1945), *superseded by statute*, FTAIA of 1982, Pub. L. No. 97-290, tit. IV, 96 Stat. 1246. The effects test in antitrust can be traced to the Supreme Court's earlier decision in *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927) (holding that the results of the conspirators' deliberate acts placed them within the Court's jurisdiction).

155. *Alcoa*, 148 F.2d at 443–44. The FTAIA codified an arguably more restrictive effects test in which the elements exist in the conjunctive: the overseas conduct must have "a direct, substantial, *and* reasonably foreseeable effect" on domestic U.S. commerce. 15 U.S.C. § 6a(1) (2000) (emphasis added); *see also* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 n.23 (1993) (considering the "direct, substantial, and reasonably foreseeable effect" language). Whether a "reasonably foreseeable" effect is the same as an intended effect is not clear. *See* McBee v. Delica Co., 417 F.3d 107, 120 n.9 (1st Cir. 2005) ("The FTAIA's 'reasonably foreseeable' requirement appears to be related to this traditional intent requirement.").

The "effects test" has analogs in many substantive legal schemes. *See, e.g.*, *id.* at 120–21 (applying the "substantial effects" test to determine extraterritorial Lanham Act jurisdiction); Doe I v. Unocal Corp., 395 F.3d 932, 961 (9th Cir. 2002) (applying an "effects

created a hybrid statute that preserved the effects test and, of the various formulations available, most closely mirrored the Department of Justice Guidelines formulation.[156] Admirable intentions to provide clarity in this area of the law were overborne by the inescapable vagueness of concepts of import and export commerce, the failure to consider the procedural basis of the FTAIA argument, and the failure to provide for treatment of claims of injury in import commerce that are specifically excepted from the statute.[157]

III. STATUTORY ANALYSIS

Like other statutes that memorialize limitations on courts' power,[158] the FTAIA first takes away courts' authority over all antitrust claims in wholly foreign or export commerce—then gives some back. Where the FTAIA applies, U.S. antitrust courts do not have authority to hear claims.[159] That authority may be found if (1) the FTAIA does not apply, as in the case of import trade or import commerce,[160] or (2) the exception is met, restoring the removed authority.[161] The exception, in turn, has two primary parts. Subsection 1 requires that for conduct to be within the reach of the antitrust laws, it must have "a direct, substantial, and reasonably foreseeable effect" on domestic commerce, import commerce, or the business of U.S. exporters.[162] Subsection 2

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test" in the context of extraterritorial application of the U.S. securities laws); Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985 & n.24 (2d Cir. 1975) (same); OSRecovery, Inc. v. One Groupe Int'l, Inc., 354 F. Supp. 2d 357, 367 & n.74 (S.D.N.Y. 2005) (applying an "effects test" in the context of a private RICO claim under 18 U.S.C. §§ 1962, 1964, relying on *Bersch* and *Empagran*).

156. The early recommendation of former Assistant Attorney General for Antitrust, John Shenefield, was to "bring the bill . . . into line with *Alcoa* and the Antitrust Guide for International Operations, published by the Justice Department." *FTAIA Hearings*, *supra* note 99, at 69 (statement of John Shenefield, Partner, Milbank, Tweed, Hadley & McCloy); *see also supra* note 6 (reporting the language of the FTAIA, as signed into law in 1982).

157. *See infra* Part III (describing problems with the FTAIA's vagueness).

158. Ready examples include the Federal Tort Claims Act, 28 U.S.C. §§ 2671–2680 (2000), and the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1611 (2000). *See* MacArthur Area Citizens Ass'n v. Republic of Peru, 809 F.2d 918, 921–23 (D.C. Cir. 1987) (comparing the Federal Tort Claims Act with the Foreign Sovereign Immunities Act).

159. *See* F. Hoffmann–La Roche Ltd. v. Empagran, 542 U.S. 155, 162–63 (2004) (stating that where the anticompetitive effect is foreign, the FTAIA general rule applies, precluding the U.S. court's authority to hear the claim); *see also* 15 U.S.C. § 6a (2000) (providing the exception to the FTAIA general rule).

160. 15 U.S.C. § 6a (2000) ("Sections 1 to 7 . . . shall not apply to conduct involving trade or commerce (*other than import trade or import commerce*) with foreign nations . . . ." (emphasis added)).

161. *Id.*

162. 15 U.S.C. § 6a(1) (2000).

requires further that the conduct "give[ ] rise to a claim" under the substantive antitrust laws.[163]

Three aspects of the FTAIA have caused interpretive problems. First is the choice of effects test: Congress's formulation most closely approximates that of the Department of Justice in the 1975 international enforcement guidelines.[164] But "direct, substantial, and reasonably foreseeable" is not self-defining and has created interpretive difficulties.[165] Second, and most significant, is the requirement that the statutory effect "give[ ] rise to a claim" under the antitrust laws[166]—loose phraseology that has caused of a recent spate of litigation at all levels of the federal court system.[167] Third is the attempt to define the classes of commerce to which the statute should apply.[168] Inherently vague concepts of "import commerce" and "export commerce" have undermined attempts to define the statute's scope.[169]

A. "Direct, Substantial and Reasonably Foreseeable"

The first of two "directness" inquiries in the FTAIA is the codification of the *Alcoa* effects test.[170] "A number of cases have been dismissed by the U.S. courts since the enactment of the FTAIA for failing to meet this standard . . . ."[171] Under the statute, only if conduct has a "direct, substantial, and reasonably foreseeable effect" in domestic U.S. commerce will claims based

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163. 15 U.S.C. § 6a(2) (2000) (referring to "sections 1 to 7 of this title, other than this section").

164. *See* 15 U.S.C. § 6a (2000) (articulating the effects test); *infra* Part III (describing the FTAIA's foundations).

165. 15 U.S.C. § 6a(1) (2000).

166. 15 U.S.C. § 6a(2) (2000).

167. *See, e.g.*, F. Hoffmann–La Roche Ltd. v. Empagran, 542 U.S. 155, 173–74 (2004) (attempting to establish the meaning of "gives rise to a claim").

168. *See* 15 U.S.C. § 6a(1)(A), (B) (2000).

169. *Id.*; *see, e.g.*, Turicentro S.A. v. Am. Airlines, Inc., 303 F.3d 293, 303 (3d Cir. 2002) (struggling with the definition of "import trade or commerce").

170. Courts note the FTAIA adopts the modern effects test and not the *American Banana* conduct test. *Compare* CSR Ltd. v. Cigna Corp., 405 F. Supp. 2d 526, 546 (D.N.J. 2005) ("[T]he Court must reject any implication that the FTAIA's 'direct, substantial, and reasonably foreseeable effect' requirement is met because certain of Defendants' actions were taken or overseen in the United States."), *with* United States v. Sisal Sales Corp., 274 U.S. 268, 276 (1927) (finding jurisdiction because the Government alleged "a conspiracy entered into by parties within the United States and made effective by acts done therein").

171. *See* JOELSON, *supra* note 10, at 41; *see also, e.g.*, *CSR Ltd.*, 405 F. Supp. 2d at 549–50 (finding that an Australian company plaintiff could not claim its injury was a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce).

on that conduct be cognizable in a U.S. antitrust court.[172] Notably, the FTAIA enacted an objective version of the intent requirement from *Alcoa*.[173] While in that case jurisdiction was available over conduct if the plaintiff intended it to impact U.S. commerce and it did impact U.S. commerce,[174] under the FTAIA, so long as the effect was reasonably foreseeable, the conduct can be reviewed. This alteration to the common-law test was intended to preclude a defense of unawareness of the consequences of one's actions.[175]

One thoughtful analysis of the meaning of the directness requirement comes from the Ninth Circuit's opinion in *United States v. LSL Biotechnologies*.[176] That case relied on the use of the word "direct" in the Foreign Sovereign Immunities Act (FSIA),[177] which the Supreme Court had defined to mean "follows 'as an immediate consequence of the defendant's . . . activity.'"[178] In *LSL Biotechnologies*, the allegations in the complaint relied on intervening events before the anticompetitive activity produced an effect in domestic commerce.[179] A direct effect might occur if the conduct prevented immediate competition in the U.S. market, but that was not the scenario in *LSL Biotechnologies*.[180]

Exactly how to reconcile the language in subsection 1 with the recognition in the legislative history that spillover effects from harm in export commerce should be sufficient to give rise to a claim in a U.S. antitrust court presents a challenge.[181] By its terms, a "spillover" effect from export commerce should not be considered a "direct" effect in domestic commerce, and certainly does not meet the standard for "direct" from *Republic of*

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172. 15 U.S.C. § 6a(1) (2000).

173. *Compare id.* (creating an objective "reasonably foreseeable effect" standard), *with supra* notes 51–55 and accompanying text (referring to the judicially created *Alcoa* test as a "wide-reaching 'intended effects' test").

174. *See supra* notes 51–55 and accompanying text (discussing the *Alcoa* case and the *Alcoa* test).

175. H.R. REP. NO. 97-686, at 9 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2494 ("An intent test might encourage ignorance of the consequences of one's actions, which in this context, would be an undesirable result.").

176. United States v. LSL Biotechnologies, 379 F.3d 672, 680 (9th Cir. 2004).

177. *Id.*; *see also* 28 U.S.C. § 1605(a)(2) (2000) (discussing the application of sovereign immunity when the conduct in question has a "direct effect in the United States").

178. Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 618 (1992) (quoting Weltover, Inc. v. Republic of Arg., 941 F.2d 145, 152 (2d Cir. 1991)) (omission in original).

179. *LSL Biotechnologies*, 379 F.3d at 681 ("An effect cannot be 'direct' where it depends on such uncertain intervening developments.").

180. *See id.* (explaining the facts and the scenario in the case).

181. *Compare* 15 U.S.C. § 6a(1) (2000), *with* H.R. REP. NO. 97-686, at 10 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2494–95.

Argentina v. Weltover of "follow[ing] as an immediate consequence of the defendant's . . . activity."[182] Indeed, in the context of the second directness inquiry under the FTAIA—whether foreign harm is sufficiently related to a domestic effect—the two courts of appeals to decide the question have held "direct" means secondary effects are not cognizable.[183]

But looking at it another way, spillover effects can be either direct or indirect. A "direct" spillover might be a local price-fixing scheme implemented to support a price-fixing scheme in the export market, by preventing arbitrage or cheating.[184] Such a scheme, if a "spillover" at all, is a spillover in name only. An "indirect" spillover effect might be an export price-fixing scheme that causes local prices to rise, as affected foreign buyers increase demand in domestic commerce in efforts to end-run the export price fixing.[185] The larger and more long-term an effect, the more likely it would be considered sufficiently "direct" to satisfy subsection 1.[186]

Another question raised by subsection 1 comes from the placement of "direct" and "substantial" in the conjunctive. Two early post-FTAIA cases from the Southern District of New York—*Papst Motoren GMbH & Co. v. Kanematsu-Goshu (U.S.A.) Inc.* and *El Cid, Ltd. v. New Jersey Zinc Co.*—have held that both size and directness of an effect are not required.[187] Sufficient

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182. *Weltover, Inc.*, 504 U.S. at 618 (internal quotation marks omitted); *cf.* Empagran S.A. v. F. Hoffmann–LaRoche, Ltd. (*Empagran II*), 417 F.3d 1267, 1271 (D.C. Cir. 2005) (finding an effect in foreign commerce, derived from a direct effect in U.S. commerce, insufficiently proximate to permit jurisdiction).

183. *See infra* notes 248–50 and accompanying text.

184. *Cf. Empagran II*, 417 F.3d at 1269. Such a scheme, implemented and having an effect in domestic commerce, would be outside of the FTAIA. *See id.*; *see also* 15 U.S.C. § 6a (2000). The "spillover" effect language in the legislative history, then, would only have the effect of averting the concern that the FTAIA placed a limit on courts' ability to hear claims that were otherwise within the heartland of their antitrust jurisdiction because the conduct was related to a course of extraterritorial conduct.

185. One commentator reads into the legislative history an intent that this sort of indirect spillover effect would be within U.S. antitrust courts' reach. *See* O'Malley, *supra* note 102, at 224 (citing H.R. REP. NO. 97-686, at 10 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2495).

186. *See* H.R. REP. NO. 97-686, at 13 (concluding that the spillover effect would, "at least over time meet the test of a direct, substantial and reasonably foreseeable effect on domestic commerce").

187. Papst Motoren GMbH & Co. v. Kanematsu-Goshu (U.S.A.) Inc., 629 F. Supp. 864, 868 (S.D.N.Y. 1986) (observing that "any demonstrable effect" on commerce that is more than *de minimus* as sufficient to invoke the Sherman Act); El Cid, Ltd. v. N.J. Zinc Co., 551 F. Supp. 626, 629 (S.D.N.Y. 1982) ("'[I]t is probably not necessary for the effect on foreign commerce to be both substantial and direct so long as it is not *de minimus*.'" (quoting Dominicus Americana Bohio v. Gulf & W. Indus., Inc., 473 F. Supp. 680, 687 (S.D.N.Y. 1979))).

magnitude of effect can be a proxy for directness.[188] Both cases relied on pre-FTAIA authority to reach the conclusion that "direct" and "substantial" could operate in the disjunctive, and language in the legislative history also supports the proposition that directness is part-and-parcel of magnitude. But both cases also stated the rule in dicta; in both circumstances, the effect was held to be at most *de minimis* and the claims were not heard.[189]

B. "Gives Rise to a Claim"

The requirement that a harm in domestic commerce "give[ ] rise to a claim" has been the basis for extensive litigation at all levels of the federal court system since at least the late 1990s, and has removed the primary interpretive issue under the FTAIA. One case, *F. Hoffman-LaRoche Ltd. v. Empagran*, worked its way to the Supreme Court and produced an opinion on remand in the D.C. Circuit.[190] *Empagran* is the primary source of the modern rules governing extraterritoriality under the FTAIA. In *Empagran*, plaintiffs alleged price fixing in violation of section 1 on a worldwide scale.[191] The plaintiffs were distributors of the price-fixed products from around the globe.[192] Faced with worldwide conspiracy claims like those in *Empagran*, defendants argue, on the one hand, the FTAIA limits courts' authority, allowing only those claims based on harm felt in U.S. commerce.[193] Defendants also have argued the foreign purchasers, whose injuries were felt in foreign commerce, lacked antitrust standing.[194] According to the latter argument, the plaintiffs must have suffered injuries flowing from the effects felt

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188. *Papst Motoren*, 629 F. Supp. at 869 (citing *Dominicus Americana Bohio*, 473 F. Supp. at 687); *El Cid*, 551 F. Supp. at 629 (explaining that "any demonstrable effect would suffice").

189. *Papst Motoren*, 629 F. Supp. at 869; *El Cid*, 551 F. Supp. at 629.

190. F. Hoffmann–La Roche Ltd. v. Empagran, 542 U.S. 155 (2004); Empagran v. F. Hoffman–LaRoche, Ltd. (*Empagran II*), 417 F.3d 1267 (D.C. Cir. 2005).

191. Empagran v. F. Hoffman–LaRoche, Ltd., 315 F.3d 338, 340 (D.C. Cir. 2003) (alleging a Sherman Act violation under 15 U.S.C. § 1), *vacated*, 542 U.S. 155 (2004).

192. *Id.* at 342.

193. Empagran v. F. Hoffman–La Roche, Ltd., No. Civ. 001686TFH, 2001 WL 761360, at *2 (D.D.C. June 7, 2001) (arguing that the injury must be sustained in U.S. commerce and be "the direct, substantial, and reasonably foreseeable" result of the defendant's conduct), *rev'd and vacated*, 315 F.3d 338 (D.C. Cir. 2003), *vacated*, 542 U.S. 155 (2004). The *Empagran* plaintiffs were originally a class of foreign and domestic purchasers of vitamins, but to separate those claims subject to the FTAIA from those that were not, the district court bifurcated the class. *Empagran*, 315 F.3d at 342.

194. *Empagran*, 2001 WL 761360, at *5; *see also Empagran*, 315 F.3d at 342.

in U.S. commerce, which is the only harm the U.S. antitrust laws were intended to prevent.[195]

1. The Definite and an Indefinite Article. Plaintiffs arguing for reading the FTAIA to permit claims of foreign harm make two arguments. Under one argument, so long as there was an effect in U.S. commerce, the effect need have no connection to the harm suffered by the plaintiffs.[196] Plaintiffs rely on a close reading of the phrase "gives rise to a claim" in subsection 2.[197] According to this argument, the conduct alleged must only give rise to *a claim*, which was not necessarily their own. The contrary view is that the effect in U.S. commerce must give rise to the plaintiff's claim.[198]

This argument had split the courts of appeals. In 2001, the Fifth Circuit, over a strong dissent by Judge Higginbotham, held in *Den Norske Stats Oljeselskap v. HeereMac VOF* (*Statoil*) that "gives rise to a claim" required that the domestic effect of the defendant's conduct must have caused the injury the plaintiff is suing over.[199] The plaintiffs in *Statoil* had suffered their injuries from the defendants' alleged bid-rigging in the North Sea.[200] Although the same course of conduct was alleged to have caused injuries in U.S. commerce, the plaintiffs before the Fifth Circuit did not suffer harm in U.S. commerce.[201] Over Judge Higginbotham's argument in dissent that the plain language of

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195. *See* Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Petition for Rehearing En Banc at 8–10, *Empagran*, 315 F.3d 338 (D.C. Cir. 2003) (No. 01-7115) [hereinafter Brief for the United States & FTC], *available at* http://www.usdoj.gov/osg/briefs/2003/3mer/1ami/2003-0724.mer.ami.pdf (arguing that the FTAIA's focus "is on domestic effects of anticompetitive conduct" and should not apply to injuries arising entirely in a foreign nation from an effect on foreign commerce).

196. *Empagran*, 315 F.3d at 344 (inquiring whether "it [is] enough for a plaintiff to show that the anticompetitive effects of the defendant's conduct on U.S. commerce give rise to an antitrust claim under the Sherman Act by someone, even if not the plaintiff who is before the court").

197. 15 U.S.C. § 6a(2) (2000). This sort of textual analysis has only recently gained traction in antitrust decisionmaking. *See, e.g.*, *Empagran*, 542 U.S. at 173–74; Transcript of Oral Argument at 10–14, Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164 (2006) (No. 04-905) (demanding a textual reason for an argument, not a policy reason).

198. A third view is that the conduct need not give rise to any private claims, so long as it creates jurisdiction and permits the government to sue to enforce the antitrust laws. *See* Kruman v. Christie's Int'l PLC, 284 F.3d 384, 399–400 (2d Cir. 2002), *abrogated by Empagran*, 542 U.S. 155.

199. Den Norske Stats Oljeselskap v. HeereMac VOF (*Statoil*), 241 F.3d 420, 421–22 (5th Cir. 2001) (deciding that the plaintiff lacked standing because the injury "did not arise from that domestic anticompetitive effect").

200. *Id.* at 421.

201. *Id.* at 422–23 (noting criminal prosecution for bid rigging in U.S. commerce).

"gives rise to a claim" meant *any* claim—including the claims of hypothetical plaintiffs not before the court[202]—the panel majority held the plaintiffs suing must have suffered their injuries in domestic commerce to come within the reach of the FTAIA.[203]

By contrast, in 2003, the D.C. Circuit in *Empagran* interpreted "gives rise to a claim" to mean a claim by any private plaintiff, whether or not that plaintiff was in front of the court. So long as some plaintiff suffered harm in domestic U.S. commerce from the effect of the complained-of conduct, the plaintiffs who suffered harm overseas, from the same conduct, were cognizable.[204] Under the D.C. Circuit's approach, foreign plaintiffs' rights to sue would be derivative of the rights of hypothetical domestic plaintiffs. This opinion, too, was rendered over a dissent. Judge Henderson believed no basis existed in the FTAIA to establish a derivative right of action.[205]

The Second Circuit, in 2002, followed the most liberal possible interpretation of the "gives rise to a claim" language. Under the approach in *Kruman v. Christie's Int'l PLC*,[206] the complained-of conduct need not have caused *any* harm in U.S. commerce, so long as it provided a basis for a suit or prosecution by a government entity.[207] Thus, "a claim" might include a claim brought by the United States, which unlike private plaintiffs, is not obliged to demonstrate harm.[208]

Recognizing the conflict, the Seventh Circuit in *Metallgesellschaft A.G. v. Sumitomo Corp*. decided it "need not come to a definitive resolution of the issue in this case."[209] It preferred the approach followed in *Kruman* and *Empagran*, which it thought most consistent with its prior en banc holding in *United Phosphorus, Ltd. v. Angus Chemical Co.*[210] In

202. *Id.* at 432 (Higginbotham, J., dissenting) (arguing that the use of "a claim" instead of "the claim" was intentional on the part of the drafters of the statute).

203. *Id.* at 428–29 & n.28 (majority opinion).

204. *See* Empagran v. F. Hoffman–LaRoche, Ltd., 315 F.3d 338, 350 (D.C. Cir. 2003), *vacated*, 542 U.S. 155 (2004).

205. *Id.* at 360 (Henderson, J., dissenting) ("'[G]ives rise to a claim' refers to the claim advanced by the plaintiff in the action before the court.").

206. Kruman v. Christie's Int'l PLC, 284 F.3d 384, 399–400 (2d Cir. 2002), *abrogated by* F. Hoffmann–La Roche Ltd. v. Empagran, 542 U.S. 155 (2004).

207. *Id.* ("[T]he FTAIA only requires that the domestic effect violate the substantive provisions of the Sherman Act."); *see also Empagran*, 315 F.3d at 347–48 (discussing the Second Circuit's holding in *Kruman*).

208. *See* 15 U.S.C. § 4 (2000) (right of action provision for the United States); *Empagran*, 542 U.S. at 170–71 (noting the distinction between private plaintiffs and government plaintiffs is that government plaintiffs need not show standing).

209. Metallgesellschaft A.G. v. Sumitomo Corp., 325 F.3d 836, 840 (7th Cir. 2003).

210. *See id.* at 838–41; *see also* United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942 (7th Cir. 2003) (en banc).

Metallgesellschaft, the plaintiff had alleged injuries suffered in U.S. domestic commerce "as a result of physical copper transactions that took place within the United States or copper futures transactions on a U.S. exchange."[211]

On the third effort to achieve Supreme Court review of this issue,[212] the Supreme Court held in *Empagran* that plaintiffs must do more than merely allege the defendant's antitrust-violative conduct gave rise to "a" claim under the antitrust laws. The conduct must have given rise to "the" claim that formed the basis of their lawsuit.[213] The most immediate result of the *Empagran* rule was that the Supreme Court vacated the decision of one Second Circuit case, *Sniado v. Bank Austria, A.G.*[214] In *Sniado*, the Second Circuit followed the *Kruman* rule to hold that the existence of *any* claim in U.S. commerce was sufficient to permit a claim of injury felt in foreign commerce to proceed.[215] On remand, the Second Circuit held the foreign plaintiffs' claim could not be heard, because the plaintiffs had not alleged any nexus between a domestic effect of overseas conduct and their foreign injuries.[216]

In *Empagran*, the Court rejected the textualist reading of the FTAIA followed by the majority of the D.C. Circuit panel.[217] This rejection is somewhat surprising. The literalist interpretation hews closely to the plain language of the FTAIA.

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211. *See Metallgesellschaft A.G.*, 325 F.3d at 841. The involvement of a U.S. exchange distinguishes *Metallgesellschaft* from the Southern District of New York's holding in *de Atucha v. Commodity Exchange, Inc.*, refusing to find standing for a plaintiff claiming harm from purchases on the London Mercantile Exchange. de Atucha v. Commodity Exch., Inc., 608 F. Supp. 510, 515–16 (S.D.N.Y. 1985); *see also Metallgesellschaft A.G.*, 325 F.3d at 841 (distinguishing *de Atucha*).

212. The first certiorari petition was filed and denied in *Statoil ASA v. HeereMac v.o.f.*, 534 U.S. 1127 (2002). The Court called for the views of the Solicitor General, who recommended the petition not be granted because the Solicitor General believed the Fifth Circuit's decision to be correct. *See* Brief for the United States and Federal Trade Commission as Amici Curiae at 5, Statoil ASA v. HeereMac v.o.f., No. 00-1842 (U.S. Jan. 3, 2002), *available at* http://www.usdoj.gov/osg/briefs/2001/2pet/6invit/2000-1842.pet.ami.inv.pdf. The second petition was filed in *Christie's Int'l PLC v. Kruman*, 539 U.S. 978 (2003), but certiorari was dismissed when the parties settled. The Supreme Court finally granted certiorari on this issue in *Empagran*, 542 U.S. at 155.

213. *Empagran*, 542 U.S. at 174–75.

214. *Compare id.* at 173–74 (declaring that the domestic effect of the alleged antitrust conduct must give rise to the plaintiff's claim), *with* Sniado v. Bank Austria AG, 352 F.3d 73, 78 (2d Cir. 2003) (requiring only that the effect of conduct on domestic commerce give rise to "a claim" under the Sherman Act, not specifically to plaintiff's claim), *vacated*, 378 F.3d 210 (2d Cir. 2004).

215. *Sniado*, 352 F.3d at 78.

216. *Sniado*, 378 F.3d at 212–13 (vacating the earlier panel's decision and affirming the district court's dismissal of the case, in light of *Empagran*). The Second Circuit held that in light of *Empagran*, the complaint must be dismissed. *Id.* at 212.

217. *See Empagran*, 542 U.S. at 173–75.

Section 6a(1) permits suit in a U.S. antitrust court if the complained-of conduct "gives rise to a claim" under the substantive antitrust laws.[218] The Court noted respondents' "linguistic logic" regarding Congress's choice of the indefinite article "a."[219] It acknowledged "respondents' linguistic arguments might show that respondents' reading is the more natural reading of the statutory language."[220] In concurrence, Justice Scalia—famous for his "textualist" statutory interpretive philosophy[221]—"concur[red] in the judgment of the Court because the language of the statute is readily susceptible of the interpretation the Court provides."[222]

Two primary rationales support the Supreme Court's interpretation of the troublesome subsection 2. First, the prescriptive comity doctrine supports a construction that "avoid[s] unreasonable interference with the sovereign authority of other nations."[223] Under this doctrine, "'[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains.'"[224] "Though it clearly has constitutional authority to do so, Congress is generally presumed

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218. 15 U.S.C. § 6a(2) (2000); *see supra* Part II.B (describing the FTAIA).

219. *Empagran*, 542 U.S. at 174.

220. *Id.* The majority was comfortable that notions of prescriptive comity overcame the statute's plain language. *Id.* at 175.

221. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23–25 (1997) (praising textualism as an analytical tool); *see also* Max Huffman, *Using All Available Information*, 25 REV. LITIG. 501, 517–18 (2006) (reviewing STEPHEN G. BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005) (describing Justice Scalia's use of textualism)).

222. *Empagran*, 542 U.S. at 176 (Scalia, J., concurring). Justice Scalia was swayed by principles of "deference to the application of foreign countries' laws within their own territories." *Id.*

223. *Id.* at 164 (majority opinion) (citing McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20–22 (1963)). On prescriptive comity generally, see *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 812–22 (1993) (Scalia, J., dissenting in part). Under this doctrine, "'[a]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains.'" *Id.* at 814–15 (quoting Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.)). "Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe." *Id.* at 815. *See generally* Pamela Karten Bookman, Note, *Solving the Extraterritoriality Problem: Lessons from the Honest Services Statute*, 92 VA. L. REV. 749, 755–59 (2006) (describing the prescriptive comity doctrine).

The *Empagran* Court expressed grave concern for the international comity ramifications of U.S. antitrust courts' jurisdictional overreaching. As in cases in lower courts leading up to the enactment of the FTAIA, the presence in the litigation of several foreign government amici figured prominently in the opinion. *Compare Empagran*, 542 U.S. at 167–69 (citing to briefs filed by the governments of Germany, Canada, and Japan), *with In re* Uranium Antitrust Litig., 617 F.2d 1248, 1254–55 (7th Cir. 1980) (noting the involvement of the government of the United Kingdom in the litigation).

224. *Hartford Fire*, 509 U.S. at 814–15 (quoting *Murray*, 6 U.S. (2 Cranch) at 118).

not to have exceeded those customary international-law limits on jurisdiction to prescribe."[225] Second, the passage of the statute narrowed, rather than broadened, the scope of extraterritorial application of the U.S. antitrust laws, and no cases prior to 1982 permitted suit by private plaintiffs injured in foreign commerce.[226]

The emphasis on comity in the Supreme Court is a sea-change. Eleven years prior in *Hartford Fire Insurance Co. v. California*, the Court had defined the scope of the comity analysis narrowly.[227] In *Hartford Fire*, the Court considered allegations that insurers had conspired overseas to limit the sort of insurance policies that would be written and that the conspiracy affected U.S. consumers.[228] Although the conspiracy occurred overseas, because its effects were felt in the United States, U.S. courts had jurisdiction over claims against those insurers.[229] The limited comity consideration the Court endorsed in *Hartford Fire* asked whether there was a direct conflict between the U.S. scheme and the particular foreign regulatory scheme at issue.[230] Because British law did not *require* the conduct in which the defendants had engaged, the Court held there was no direct conflict.[231] Justice Scalia's dissent in *Hartford Fire* would have

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225. *Id.* at 815.

226. *Empagran*, 542 U.S. at 169, 171–73. The opinion qualified this discussion as helpful "[f]or those who find legislative history useful." *Id.* at 163. Writing for six Justices, Justice Breyer appears to be referring in this passage to a concurrence in which Justice Scalia, joined by Justice Thomas, concurred in the judgment by relying solely on the text of the statute and canons of construction. *See id.* at 176 (Scalia, J., concurring in the judgment). *See generally* Huffman, *supra* note 221, at 505–06 & n.19 (noting the regularity with which Justices Breyer and Scalia concur in each other's opinions, advancing their own views of the statutory interpretive process).

Justices Scalia and Thomas concurred in the judgment only. *Empagran*, 542 U.S. at 176 (Scalia, J., concurring in the judgment). They would have relied solely on the text of the FTAIA, interpreted in light of "the principle that statutes should be read in accord with the customary deference to the application of foreign countries' laws within their own territories"—that is, the prescriptive comity canon. *Id.* at 176.

227. *Hartford Fire*, 509 U.S. at 798; *see also* Hannah L. Buxbaum, *National Courts, Global Cartels:* F. Hoffmann–LaRoche Ltd. v. Empagran, S.A. *(U.S. Supreme Court 2004)*, 5 GERMAN L.J. 1095, 1101 (2004) (discussing *Empagran* as evidence of a "renewed interest on the part of the Supreme Court in using principles of comity to confine the extraterritorial reach of U.S. antitrust law").

228. *Hartford Fire*, 509 U.S. at 769–72.

229. *Id.* at 795 (noting that the London reinsurers conceded to the federal court's jurisdiction under the Sherman Act).

230. In requiring a direct conflict, the *Hartford Fire* Court gave dispositive weight to one of the several comity factors recognized by the *Restatement*, *Timberlane*, and *Brewster*. *See supra* note 65.

231. *Hartford Fire*, 509 U.S. at 798–99 ("[E]ven assuming that in a proper case a court may decline to exercise Sherman Act jurisdiction over foreign conduct . . . , international comity would not counsel against exercising jurisdiction in the

relied on principles of prescriptive comity to avoid conflict with British law.[232]

By contrast, in *Empagran*, all eight voting Justices[233] agreed that concerns for comity ramifications of overreaching by U.S. antitrust courts mandated an interpretation of the FTAIA that limited the reach of the U.S. antitrust laws where other nations' regulatory interests were at stake.[234] Despite its paean to comity concerns, the *Empagran* Court did not explicitly cast doubt on *Hartford Fire*.[235]

2. The Empagran *Exception.* Under the *Empagran* plaintiffs' second theory, if the FTAIA permitted jurisdiction only over claims with a nexus to an effect on domestic U.S. commerce, plaintiffs' claims might nonetheless be cognizable.[236] Plaintiffs argued the defendants had been engaged in a worldwide price-fixing conspiracy, in which all conduct was interdependent on all other conduct.[237]

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circumstances alleged here."); *see also* JOELSON, *supra* note 10, at 44.

232. *Hartford Fire*, 509 U.S. at 817–19 (Scalia, J., dissenting) (defining prescriptive comity as "the respect sovereign nations afford each other by limiting the reach of their laws").

233. *See* F. Hoffmann–La Roche Ltd. v. Empagran, 542 U.S. 155, 175 (2004) (noting that Justice O'Connor did not take part in the judgment).

234. *Id.* at 164–69 ("[I]f America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat.").

235. *Cf.* McBee v. Delica Co., 417 F.3d 107, 116–17, 119–20 (1st Cir. 2005) (relying on both *Empagran* and *Hartford Fire*). *Compare* Buxbaum, *supra* note 227, at 1102 (stating that *Empagran* "signals acceptance of the notion that comity operates actually to limit the reach of U.S. law to foreign conduct"), *with* Wolfgang Wurmnest, *Foreign Private Plaintiffs, Global Conspiracies, and the Extraterritorial Application of U.S. Antitrust Law*, 28 HASTINGS INT'L & COMP. L. REV. 205, 218 (2005) (calling *Hartford Fire* "a near death blow to comity"), *and* S. Lynn Diamond, Note, Empagran, *the FTAIA and Extraterritorial Effects: Guidance to Courts Facing Questions of Antitrust Jurisdiction Still Lacking*, 31 BROOK. J. INT'L L. 805, 814–15 (2006) (interpreting *Hartford Fire* to relegate comity principles to a circumstance of true conflict between a foreign regime and U.S. law).

The importance of comity concerns in extraterritorial commercial regulation has received significant scholarly attention. *See, e.g.*, Ellen S. Podgor, *A New Dimension in the Prosecution of White Collar Crime: Enforcing Extraterritorial Social Harms*, 37 MCGEORGE L. REV. 83, 84 (2006) (arguing that comity concerns should receive more attention, with particular attention to the question of "the location of the social harm" to be remedied).

236. *Empagran*, 542 U.S. at 175 ("Respondents argue . . . that the foreign injury was not independent. Rather, . . . the anticompetitive conduct's domestic effects were linked to that foreign harm.").

237. "Respondents contend that, because vitamins are fungible and readily transportable, without an adverse domestic effect (*i.e.*, higher prices in the United States), the sellers could not have maintained their international price-fixing arrangement and respondents would not have suffered their foreign injury." *Id.* at 175; *see also* Diamond, *supra* note 235, at 809 ("With rampant globalization, instantaneous communication, and multinationals building products with components from all over the world and selling

The interdependence theory is not new. The concern was raised by a witness statement contained in the statute's legislative history, but that source does not provide any resolution of the interdependence questions.[238] In 1985, in *de Atucha v. Commodity Exchange, Inc.*, the plaintiff alleged that "'[b]ecause of the fungibility of silver and silver futures, the United States market . . . and the London Exchange function from an economic standpoint as a single market . . . .'"[239] The Court rephrased the plaintiff's position thusly: "[D]e Atucha's theory of standing, as we understand it, is that he may sue under American antitrust laws because the defendants' manipulation of the American silver markets produced his injury on the [London Metals Exchange]."[240]

According to economic theory, in a worldwide conspiracy, stable prices in a particular geographic locale are essential to avoid "cheating," and, therefore, to maintaining stable prices in other locales.[241] A related concern is that of arbitrage.[242] Even independent of cheating by participants in the cartel, distributors or third parties could take advantage of lower prices in one geographic market to move product on their own from a competitive market to a fixed-price market.[243] That theory is a

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them far from where they are produced, it may be argued that there no longer are independent, national markets.").

238. See H.R. REP. NO. 97-686, at 4 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2488 (quoting testimony of Professor James A. Rahl, Professor of Law, Northwestern University); *see also FTAIA Hearings*, *supra* note 99, at 106 (testimony of Martin F. Connor, Corporate Counsel, General Electric, on behalf of the Business Roundtable).

239. de Atucha v. Commodity Exch., Inc., 608 F. Supp. 510, 512 (S.D.N.Y. 1985) (quoting plaintiff's complaint).

240. *Id.* at 513.

241. *See* John M. Connor, *Extraterritoriality of the Sherman Act and Deterrence of Private International Cartels* 9–10 (Purdue Univ. Dep't of Agric. Econ., Staff Paper No. 04-08, 2004), *available at* http://www.agecon.purdue.edu/staff/connor/papers/Extraterritoriality_LR_Version_5-04-04.pdf (noting the likelihood of geographic arbitrage in the world market for vitamins at issue in *Empagran*). *See generally* BORK, *supra* note 6, at 102–04 (describing the incentives that make cheating on cartels likely); Katherine Maddox McElroy & John J. Siegfried, *The Economics of Price Fixing*, *in* ECONOMIC ANALYSIS AND ANTITRUST LAW 139, 143, 145–46 (Terry Calvani & John Siegfried eds., 2d ed. 1988) (suggesting conditions required to stabilize cartels); Margaret Levenstein & Valerie Y. Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy*, 71 ANTITRUST L.J. 801, 819 n.19 (2004) (collecting and mentioning authorities on the topic); George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44, 44, 46–47 (1964) (discussing the theory of oligopolies and the difficulties of policing collusion among market participants).

242. *See* Connor, *supra* note 241, at 9–10 (observing that geographic displacement caused by fluctuating currency rates creates a negative impact on a cartel's pricing power).

243. *Id.* (providing a thorough analysis of this effect and discussing geographic arbitrage and the steps taken by cartels to minimize its effect).

likely explanation for the solicitude in the legislative history for "spillover" effects in domestic commerce.

The *Empagran* Court noted that allegations of a world-wide conspiracy might be sufficient to conclude the U.S. effect gave rise to foreign harm.[244] It did not define what sort of interdependence of commerce might be sufficient to satisfy the "gives rise to" requirement, stating: "The Court of Appeals, however, did not address this argument, and, for that reason, neither shall we."[245] I have previously labeled this exception for interdependent commercial activity "the *Empagran* exception."[246]

3. Directness Again: Proximate Cause. On remand from the Supreme Court's *Empagran* opinion (*Empagran II*), the D.C. Circuit adopted a proximate cause analysis to define the *Empagran* exception.[247] The court held that the "gives rise to" language "indicates a direct causal relationship, that is, proximate causation, and is not satisfied by the mere but-for 'nexus' the appellants advanced," defining the second "directness" requirement from the statute—a rule the plaintiffs had conceded.[248] After *Empagran*, the only other court of appeals to interpret subsection 2, the Eighth Circuit Court in *In re Monosodium Glutamate Antitrust Litigation*, followed the D.C. Circuit's lead.[249]

Those courts' interpretations are suspect. The statute lacks any requirement of a direct relationship between the effect and the plaintiff's claim, as it does for the effects test in subsection 1, and the *expressio unius* canon of construction implies that omission

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244. Throughout the opinion, the Court took great pains to make clear that it based its decision on the assumption that "the adverse foreign effect is independent of any adverse domestic effect." F. Hoffmann–La Roche Ltd. v. Empagran, 542 U.S. 155, 164 (2004).

245. *Id.* at 175 (citation omitted).

246. *See* Huffman, *supra* note 2 (manuscript at 43–49).

247. Empagran v. F. Hoffmann–LaRoche, Ltd. (*Empagran II*), 417 F.3d 1267, 1270–71 (D.C. Cir. 2005) ("The statutory language—'gives rise to'—indicates a direct causal relationship, that is, proximate causation, and is not satisfied by the mere but-for 'nexus' the appellants advanced in their brief.").

In *OSRecovery, Inc. v. One Groupe Int'l, Inc.*, 354 F. Supp. 2d 357, 367 (S.D.N.Y. 2005), the district court considered a complaint seeking to apply the RICO statute extraterritorially. Despite the absence from the RICO scheme of a statute like the FTAIA, the court relied on the effects test from the antitrust scheme to hold that the U.S. effect of conduct must "directly cause[ ]" a foreign plaintiff's loss for the law to apply extraterritorially. *Id.* at 367.

248. *Empagran II*, 417 F.3d at 1271 (expressing the plaintiff's concession regarding "[t]he statutory language—'gives rise to'").

249. *In re* Monosodium Glutamate Antitrust Litig., 477 F.3d 535, 538 (8th Cir. 2007) ("The appellants contend that we should part ways with the D.C. Circuit. . . . We disagree.").

has meaning.[250] Had Congress meant to include a second "directness" requirement in the FTAIA, it could have required, in subsection 2, that "such effect *directly* gives rise to a claim."

Also, the proximate cause analysis has done little to alleviate the uncertainty over the reach of the FTAIA. In *Empagran II*, the causal connection apparently was not proximate because two sets of fixed prices were involved—the fixed prices in domestic U.S. commerce that supported price-fixing in foreign commerce and the fixed prices in foreign commerce that actually caused the plaintiffs' injury.[251] The former caused harm in U.S. commerce and, indirectly, the plaintiffs' harm.[252] However, it is not clear what about the alleged worldwide price-fixing scheme leads to an indirect and merely but-for, rather than a direct and proximate, causal nexus.[253] Indeed, the legislative history seems to hold that the "indirect" effects that occur from spillover of price-fixing in one market into another market should be thought sufficiently direct to satisfy the FTAIA.[254]

C. Types of Crossborder Commerce

Although at the base level, the distinction between "export commerce" (to which the FTAIA applies), "import commerce" (to which the FTAIA does not apply), "domestic commerce" (to which the FTAIA does not apply), and "foreign commerce" (to which the FTAIA applies) is simple enough, the distinction has created some difficulty in courts tasked with determining the reach of their authority to hear antitrust claims in crossborder situations.[255]

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250. *Compare* 15 U.S.C. § 6a(1) ("direct, substantial, and reasonably foreseeable effect"), *with* 15 U.S.C. § 6a(2) (2000) ("gives rise to a claim"). *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974), provides a concise definition of this "ancient maxim—*expression unius est exclusion alterius*."

251. *Empagran II*, 417 F.3d at 1270 ("[T]hey were able to sustain super-competitive prices abroad only by maintaining super-competitive prices in the United States as well.").

252. *Id.* (explaining the appellants' theory on the harm and its causation).

253. The Supreme Court denied certiorari. Empagran v. F. Hoffmann–La Roche Ltd., 126 S. Ct. 1043 (2006).

254. *See* H.R. REP. NO. 97-686, at 2 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2498; O'Malley, *supra* note 102, at 224 ("[A] spillover effect in which inflated prices in foreign markets would have the effect of raising domestic prices . . . would more than likely meet the direct, substantial, and reasonably foreseeable effect on domestic commerce.").

255. *See* JOELSON, *supra* note 10, at 37 ("By its very nature, foreign commerce may involve activity abroad, as well as at home. It may encompass acts of U.S. citizens in foreign countries and in the United Status, and acts of aliens in the U.S., as well as in

Foreign plaintiffs have demonstrated abilities to piggyback their claims onto claims that do arise in the type of commerce at issue. One example is the situation of foreign plaintiffs who export from their home jurisdictions into the U.S. market. By claiming harm in "import commerce," those plaintiffs seek to escape the application of the FTAIA completely.[256] For example, in *Turicentro v. American Airlines Inc.*, the plaintiffs were foreign travel agents who marketed their services to U.S. citizens.[257] They alleged harm due to the fixing of commissions by the airlines in commerce closely related to crossborder trade entering the United States, arguing it was "import trade or commerce" and therefore exempt from the application of the FTAIA.[258] The Third Circuit held that the fact that some U.S. purchasers bought services from the foreign plaintiffs was "immaterial."[259] The harm suffered by the foreign plaintiffs was in foreign commerce, not import commerce, and the FTAIA applied.[260]

A different piggybacking attempt was rejected in *The "In" Porters v. Hanes Printables, Inc.*[261] In that case, the plaintiff alleged harm felt in export commerce from the United States but was not a U.S. exporter within the requirements of the FTAIA.[262] The plaintiff argued, however, that other U.S. exporters were harmed because of the defendant's conduct, which included binding the plaintiff to an exclusive distributorship arrangement and preventing plaintiff from purchasing from other U.S.

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their own and in third countries."); Cavanagh, *supra* note 102, at 2159–72 (describing four "concrete factual scenarios in which jurisdiccional issues arise"); *cf.* Swift & Co. v. United States, 196 U.S. 375, 398 (1905) ("Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business."); TAFT, *supra* note 134, at 80–82 (emphasizing the practical, rather than formalistic, nature of crossborder commerce).

256. *See* 15 U.S.C. § 6a (2000) (stating that the section is not applicable to import commerce).

257. Turicentro v. Am. Airlines Inc., 303 F.3d 293, 296 (3d Cir. 2002).

258. *Id.* at 302–03 (reasoning that because the Sherman Act continues to apply to import trade and commerce, the FTAIA is rendered inapplicable to an action alleging an impact on import trade or import commerce).

259. *Id.* at 303.

260. *Id.* at 303–04 ("[The] defendants were not involved in 'import trade or import commerce,' but rather were engaged in 'conduct involving trade or commerce (other than import trade or import commerce) with foreign nations.'" (quoting 15 U.S.C. § 6a (2000)).

261. The "In" Porters v. Hanes Printables, Inc., 663 F. Supp. 494, 495 (M.D.N.C. 1987).

262. *Id.* at 499.

exporters.[263] The court held the FTAIA "requires an actual injury to a plaintiff within the United States."[264]

The decision of the Southern District of New York in *Eskofot A/S v. E.I. Du Pont De Nemours & Co.* deviates from *Turicentro* and *The "In" Porters*.[265] In *Eskofot*, the court viewed as "import commerce" actions by a Danish company attempting to enter the U.S. market as an exporter from Denmark.[266] Because it was import commerce, the court held that the FTAIA did not apply at all.[267]

D. Procedural Implications of the FTAIA

In addition to the substantive questions regarding exactly how to define the *Empagran* exception and the other issues presented by the FTAIA, questions remain about the procedural posture of each of the FTAIA analyses. Three possibilities include treating the FTAIA questions as a matter of a court's subject matter jurisdiction, treating it as an element of the substantive offense, and treating the FTAIA question as an antitrust standing inquiry. The difficulty recalls the procedural confusion pre-dating the FTAIA.[268] Each issue is raised for both directness inquiries—the statutory inquiry under subsection 1, and the *Empagran* exception under subsection 2.

1. Substantive Element. The least likely procedural posture for the FTAIA analysis is treating it as an element of the plaintiff's substantive cause of action. In *United Phosphorous, Ltd. v. Angus Chemical Co.*, the Seventh Circuit held that the FTAIA analysis is not an element of a substantive antitrust claim.[269] Although *United Phosphorus* dealt specifically with the first FTAIA inquiry, in *Metallgesellschaft*, the Seventh Circuit demonstrated its inclination to treat the subsection 2 question as

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263. *Id.*

264. *Id.* at 500–01.

265. Eskofot A/S v. E.I. Du Pont De Nemours & Co., 872 F. Supp. 81, 83 (S.D.N.Y. 1995) (describing defendant's monopolization efforts in the international market for printing equipment and materials).

266. *Id.* at 85.

267. *Id.* (relying on the pre-FTAIA rule in *National Bank of Canada v. Interbank Card Ass'n*, 666 F.2d 6, 8–9 (2d Cir. 1981), to determine if the challenged conduct has any anticompetitive effect on U.S. commerce).

268. *See supra* notes 48–96 and accompanying text (describing the *Mannington Mills* rule and *Alcoa*'s test and procedural application).

269. United Phosphorous, Ltd. v. Angus Chem. Co., 322 F.3d 942, 950–51 (7th Cir. 2003) (en banc) ("[W]ith reference to FTAIA, the argument that the statute sets out an element of the claim or a basis for legislative jurisdiction has not gained approval.").

part of the analysis under subsection 1.[270] The *Empagran* Court did nothing to disturb the *United Phosphorus* holding or other lower-court holdings on which it relied. That failure is not dispositive. *United Phosphorus* was not before the Supreme Court, and the sole issue in *Empagran* was substantive, not procedural.[271] The *Empagran* Court left the procedural question unaddressed.[272] And *United Phosphorus* was decided over a strong dissent by Judge Wood,[273] perhaps the federal judiciary's foremost thinker on antitrust extraterritoriality issues. Judge Wood would have held that the FTAIA inquiry was an element of the plaintiff's case-in-chief.[274]

Following the "element" approach might have important implications for the manner of pleading and proof required under the statute. For example, the section 1 claim typically is thought to have two elements: an agreement and a restraint of trade.[275] The FTAIA question would add a third: harm suffered by the plaintiff from an effect on domestic commerce.[276] Maybe a more important implication is the nature of the decisionmaker on the FTAIA question. If it is an element of the substantive claim, the issue would be presented to the jury at trial, not to the judge at an earlier stage of the proceedings.[277] That approach would favor defendants, if wealth-redistributive impulses of U.S. juries do not extend to benefiting foreign plaintiffs.[278]

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270. Metallgesellschaft A.G. v. Sumitomo Corp., 325 F.3d 836, 838–40 (7th Cir. 2003).

271. Empagran v. F. Hoffmann–La Roche Ltd., 542 U.S. 155, 158–59 (2006).

272. *Id.*

273. *United Phosphorous*, 322 F.3d at 953–65 (Wood, J., dissenting) (arguing that the FTAIA should add an element to an antitrust claim).

274. *Id.* at 953–54. Judge Wood identified

> four compelling reasons why we should not construe the FTAIA's test as one going to the subject matter jurisdiction of the court, and instead should adopt what I will call an "element" approach: first, the language of the statute supports the position that this is an element of the claim, especially when it is contrasted to true jurisdiction-stripping statutes; second, the "subject matter jurisdiction" characterization is inconsistent with the Supreme Court's decision in *Steel Co.* and with the law of this court; third, the procedural consequences of a "subject matter jurisdiction" reading would have perverse effects, measured against the policies the FTAIA and the federal antitrust laws were designed to further; and finally, to call this "subject matter jurisdiction" fails to take into account the long history of the application of the U.S. antitrust laws to foreign conduct.

Id.

275. *See* Dickson v. Microsoft Corp., 309 F.3d 193, 202 (4th Cir. 2002).

276. *See* 15 U.S.C. § 6a(1)(A) (2000) (proscribing conduct that affects domestic trade or commerce).

277. *See United Phosphorous*, 322 F.3d at 963 (Wood, J., dissenting) ("[W]hen subject matter jurisdiction is contested, . . . the ultimate decision is for the court, not for a jury.").

278. *See* Dorsey D. Ellis, Jr., *Punitive Damages, Due Process, and the Jury*, 40 ALA.

2. Subject Matter Jurisdiction. Most courts have treated the FTAIA analysis as going to the question of the court's subject matter jurisdiction.[279] In regard to the subsection 1 directness inquiry, the subject matter jurisdiction approach probably is the correct one. At least one statement in the legislative history supports that approach. According to the House Conference Report, the FTAIA requires a "'direct, substantial, and reasonable [sic] foreseeable' effect on commerce in the United States . . . as a jurisdictional threshold for enforcement."[280] Courts' inclination might also be based on the historical foundation of the effects test, from which the FTAIA is derived.[281] Concentrating on the defendant's conduct, the question of "direct, substantial, and reasonably foreseeable effect" is well suited for a subject matter jurisdiction analysis.

On the other hand, even the original *Alcoa* framework evolved, in some courts' views, to include a prudential component broader than a mere subject matter jurisdiction question,[282] and Congress explicitly referenced *Mannington Mills* elsewhere in the legislative history.[283] The prudential component of the *Mannington Mills* test most appropriately is thought to speak to the subsection 2 "gives rise to" analysis.

As regards the second question, no compelling arguments support treating the inquiry as defining the extent of a court's subject matter jurisdiction. The subsection 2 question concentrates not on the defendant's conduct but on what grounds plaintiffs are entitled to sue—those whose claims arise from the conduct that subsection 1 places within the court's jurisdiction.[284] The *Empagran* Court's approach to the FTAIA also belies a pure reliance on subject matter jurisdiction. "Strangely enough, in a case that is generally discussed as being about subject matter

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L. REV. 975, 996–97 (1989) ("[T]he antagonism toward large, profit-making institutions is likely to be greater in a cross-section of jurors than in a cross-section of the community.").

279. *See, e.g.*, *United Phosphorus*, 322 F.3d at 944–45, 950–51 (majority opinion) (determining that the FTAIA presents a question of subject matter jurisdiction); Empagran v. F. Hoffman–LaRoche, Ltd., 315 F.3d 338, 340–41 (D.C. Cir. 2003) (stating that the court's objective was to interpret the jurisdictional reach of the antitrust laws), *vacated*, 542 U.S. 155 (2004); Den Norske Stats Oljeselskap v. HeereMac VOF (*Statoil*), 241 F.3d 420, 429–31 (5th Cir. 2001) (discussing the subject matter jurisdiction issue).

280. H.R. CONF. REP. No. 97-924, at 29–30 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 1233, 2490.

281. *See generally* ZWARENSTEYN, *supra* note 19 (describing the historical development of antitrust extraterritoriality and treating the extraterritoriality question for all purposes as one of a court's subject matter jurisdiction).

282. *See supra* Part IV.D.3.

283. *See* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1294 (3d Cir. 1979); H.R. REP. NO. 97-686, at 5 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2490.

284. *See* 15 U.S.C. § 6a(2) (2000).

jurisdiction, Justice Breyer used the term only once, and that was in quoting a treatise."[285] Perhaps rather than unflinching reliance on the standby of subject matter jurisdiction, the question deserves a second look.

An important implication of treating the FTAIA question as speaking to a court's subject matter jurisdiction is the nonwaivability of the issue. At any stage of the proceedings, including appellate review, the question can be addressed and a case, no matter how far it has proceeded, can be dismissed.[286] For that reason, the subject matter jurisdiction approach gives plaintiffs the least certainty possible.

3. Prudential Standing Inquiry. The third procedural approach to the FTAIA inquiries is to treat them as antitrust standing inquiries.[287] On the subsection 2 question, standing is the most likely approach. Interpreting subsection 2, the *Empagran* Court did not mention, let alone discuss or decide, the standing arguments decided by the D.C. Circuit, discussed by other courts and commentators, pressed by the parties and amici.[288] The reasons for that failure are unclear.[289] Nonetheless, good reason exists to understand Justice Breyer's opinion in *Empagran* as following the antitrust standing rationale.[290]

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285. Diamond, *supra* note 235, at 840–41 (arguing the opinion might be read as relying on a summary judgment standard).

286. *See* FED. R. CIV. P. 12(h)(3).

287. *See generally* Huffman, *supra* note 2 (manuscript at 7) (explaining "Antitrust Standing").

288. *See* Cavanagh, *supra* note 102, at 1431–32 (arguing that the Supreme Court should have ruled on the standing issue to further develop the law).

289. The opinion's author, Justice Breyer, has been called the Court's primary antitrust thinker. *See* Huffman, *supra* note 221, at 514 n.49 (mentioning Justice Breyer's background in antitrust law). Certainly, if he preferred, he was capable of following the antitrust standing argument and applying it. Other members of the *Empagran* Court had written important opinions in standing cases. *See, e.g.*, Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983) (writing, authored by Justice Stevens, an opinion concerning antitrust violations of a collective-bargaining agreement); Blue Shield of Va. v. McCready, 457 U.S. 465, 485 (Rehnquist, J., dissenting) (dissenting in opinion concerning antitrust injury arising from health insurance coverage); *id.* at 492 (Stevens, J., dissenting) (same).

290. At oral argument by the government amici in support of petitioners, the standing argument received a somewhat ignominious reception. Then-acting Assistant Attorney General R. Hewitt Pate argued, "with respect to the foreign incurred injuries, [the foreign plaintiff] must show injury by reason of that which makes the conduct illegal, and since *Alcoa* in [1945], and certainly under Hartford, it is the effect on U.S. commerce that makes the conduct the concern of the Sherman Act . . . ." Transcript of Oral Argument at 19, F. Hoffmann–La Roche Ltd. v. Empagran, 542 U.S. 155 (2004) (No. 03-724) [hereinafter Oral Argument], *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts.html. Justice Stevens—the author of *Associated General Contractors*, and an important dissent in *Blue Shield of Virginia*—queried in

Standing rationale had garnered support leading up to the *Empagran* case. In *de Atucha*, the plaintiff's lack of antitrust standing (having suffered harm through purchasing on a London commodity exchange) was the crux of the decision.[291] Then, in *Kruman*, the Second Circuit provided a highly defensible approach to the FTAIA inquiry that supports treating it as an antitrust standing question.[292] That court noted the essential distinction between the substantive provisions of the U.S. antitrust scheme[293] and the right of action provisions—including section 4 of the Clayton Act (Section Four).[294] Section Four and its requirement that a private plaintiff be injured "by reason of" a violation of the antitrust laws is the textual basis for the antitrust standing inquiry.[295] The *Kruman* court held the FTAIA permitted jurisdiction over the plaintiffs' claims, but specifically did not address the prudential standing question.[296]

There is ample indication in the *Kruman* district court opinion that it would have dismissed plaintiffs' claims on remand, had the case not settled while the petition for certiorari was pending,[297] on the grounds of antitrust standing. Judge Kaplan observed the distinction on which the Second Circuit relied between illegal conduct (governed by subsection 1) and the private right to a remedy (governed by subsection 2):

> [I]t is perfectly appropriate for the United States to punish the conspiracy—the formation and continuation of the illicit agreement—because it took place in substantial part in this country. . . . But it would be appropriate for the United

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response: "I don't follow the [argument]." Oral Argument, *supra*, at 19 (questioning whether *Hartford* dealt definitively with the issue at hand).

291. *See* de Atucha v. Commodity Exch., Inc., 608 F. Supp. 510, 518 (S.D.N.Y. 1985) (holding that "the antitrust claims are dismissed for a lack of standing"); *see also* 2 WALLER, *supra* note 3, § 13:23, at 13-59 to 13-60 (discussing the *de Atucha* court's decision regarding a lack of standing).

292. Kruman v. Christie's Int'l PLC, 284 F.3d 384, 397–403 (2d Cir. 2002), *abrogated by Empagran*, 542 U.S. 155 (2004).

293. 15 U.S.C. § 6a (2000).

294. 15 U.S.C. § 15(a) (2000).

295. *See* Cavanagh, *supra* note 102, at 2175 (""The substantive provisions of the Sherman Act determine what conduct by the defendant is actionable. The Clayton Act determines what injury a plaintiff must suffer in order to bring suit.'" (quoting *Kruman*, 284 F.3d at 398)). This distinction was lost on the D.C. Circuit in *Empagran*.

296. *Kruman*, 284 F.3d at 403 (remanding to the trial court to decide the standing issue in the first instance). By contrast, the lower court in *Empagran* ignored the careful distinction in the antitrust laws between the conduct standards and the private right of action provision, specifically rejecting arguments that the schemes should be treated separately. Empagran v. F. Hoffman–LaRoche, Ltd., 315 F.3d 338, 350–51 (D.C. Cir. 2003) (calling the structural argument "plausible but ultimately unconvincing"), *vacated*, 542 U.S. 155 (2004).

297. *See supra* notes 199–216 and accompanying text.

> States to provide remedies for injuries suffered in consequence of overt acts that occurred outside this country only if those acts, either individually or perhaps collectively, had direct, substantial and reasonable effects here that caused the injuries to be remedied.[298]

Judge Kaplan also cited provisions in the legislative history of the FTAIA demonstrating the concern for the location of the particular plaintiffs' injuries and the nexus between the effect and the injury.[299] The legislative history also demonstrates an express intent to preserve the doctrines of antitrust standing and antitrust injury.[300]

And the Supreme Court's opinion in *Empagran* is most susceptible to a prudential standing interpretation for three primary reasons.[301] First, the Court relied on *California v. American Stores Co.* to distinguish cases brought by the United States from the private suit at issue in *Empagran*.[302] In one sense, the distinction is meaningful. As the *American Stores* Court noted, private plaintiffs "must have standing . . . in order to obtain relief."[303] But "[i]n a Government case the proof of the violation of law may itself establish sufficient public injury to warrant relief."[304] Thus, the *Empagran* plaintiffs' reliance on *Timken Roller Bearing Co. v. United States*, *United States v. National Lead Co.*, and *American Tobacco Co.* as examples of

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298. Kruman v. Christie's Int'l PLC, 129 F. Supp. 2d 620, 625–26 (S.D.N.Y. 2001) (internal citation omitted), *aff'd in part, vacated in part*, 284 F.3d 384 (2d Cir. 2002), *abrogated by* F. Hoffmann–La Roche Ltd. v. Empagran, 542 U.S. 155 (2004).

299. *See id.* at 624–25 (citing H.R. REP. NO. 97-686, at 7–8 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 2487, 2492–97).

300. *See* H.R. REP. NO. 97-686, at 11 (stating that "'conduct which has an anticompetitive effect which impinges only on [parties] located in *foreign nations* and which has a neutral or procompetitive domestic effect'" does not give rise to standing under the antitrust laws (quoting *Report on Purposes and Provisions of H.R. 5235*, A.B.A. SEC. OF INT'L LAW 9) (emphasis added)).

301. This explanation finds support in the treatment of standing in briefing by the United States as amicus. The United States argued that the standing question was subsumed into the FTAIA. *See* Brief for the United States & FTC, *supra* note 195, at 9.

302. *See Empagran*, 542 U.S. at 171 (noting that private plaintiffs "are far less likely to be able to secure broad relief" (citing California v. Am. Stores Co., 495 U.S. 271, 295 (1990))).

303. *Am. Stores Co.*, 495 U.S. at 296 (citing Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 113 (1986)) (discussing standing in the context of the private injunctive remedy under section 16 of the Clayton Act).

304. *Id.* at 295 (citing United States v. E. I. Du Pont de Nemours & Co., 366 U.S. 316, 319–21 (1961)); *see also In re* Canadian Import Antitrust Litig., 470 F.3d 785, 791 (8th Cir. 2006) ("Unlike a governmental entity . . . a private plaintiff must demonstrate that he has suffered an 'antitrust injury' as a result of the alleged conduct of the defendants, and that he has standing to pursue a claim under the federal antitrust laws.").

extraterritorial application of the U.S. antitrust laws before the FTAIA was enacted in 1982 was ineffective as to the interpretation of the statute.[305] *American Stores* taught that those cases did not speak to the standards for extraterritoriality in *private* litigation.[306]

But the FTAIA makes no distinction between public and private plaintiffs. It applies whether the suit is one by the government as a regulator or a private plaintiff seeking compensation for harm suffered as a market participant. The distinction between public and private enforcement is relevant because only the private plaintiff must establish its standing to sue. Invoking *American Stores* demonstrates implicit reliance on a prudential standing inquiry.

Second, the *Empagran* Court looked to comity considerations and first-principles deterrence rationales that are best suited to a malleable standing analysis. According to the First Circuit in a trademark extraterritoriality case decided in partial reliance on the *Empagran* rule, "[c]omity considerations . . . are properly treated as questions of whether a court should, in its discretion, decline to exercise subject matter jurisdiction that it already possesses."[307] That understanding of the proper procedural treatment of the comity analysis is reminiscent of the *Mannington Mills* approach.

The same is true for first-principles deterrence rationales. Deterrence principles are not found in the text of the FTAIA. Congress left to the courts the question whether and how to invoke that principle. In the best known deterrence decision, *Pfizer Inc. v. Government of India*,[308] the Court invoked the private right of action provision, Clayton Act Section Four,[309] and interpreted the class of plaintiffs with standing to sue to include

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305. *Empagran*, 542 U.S. at 170 (citing Timken Roller Bearing Co. v. United States, 341 U.S. 593, 595 (1951); United States v. Nat'l Lead Co., 332 U.S. 319, 325–28 (1947); United States v. Am. Tobacco Co., 221 U.S. 106, 171–72 (1911)).

306. *Id.* at 170–71 (citing *Am. Stores Co.*, 495 U.S. at 295).

307. McBee v. Delica Co., 417 F.3d 107, 111, 117 (1st Cir. 2005) ("Our approach to each of these issues is in harmony with the analogous rules for extraterritorial application of the antitrust laws." (citing Hartford Fire Ins. Co. v. California, 509 U.S. 764, 795–99 (1993))). The *McBee* approach to comity considerations appreciates that comity concerns evolve, appear and disappear over time. *See* Huffman, *supra* note 2 (manuscript at 41 & n.187). That will especially be so as international antitrust standards converge. *Cf.* ZWARENSTEYN, *supra* note 19, at 99 (no concern for overlapping enforcement if standards are uniform). Convergence is occurring in many quarters and promises to continue apace. *See* Kovacic, *Extraterritoriality, Institutions, and Convergence in International Competition Policy*, *supra* note 99, at 309.

308. Pfizer, Inc. v. Gov't of India, 434 U.S. 308 (1978).

309. 15 U.S.C. § 15(a) (2000).

foreign sovereigns.[310] It did not expand the reach of antitrust courts' subject matter jurisdiction to accomplish that goal.[311] In *Empagran*, the Supreme Court relied on an "inverse deterrence" argument—under which concerns for undermining public enforcement efforts both domestically and abroad argued for limiting private plaintiff suits to a rational level[312]—that did not exist under the extraterritoriality precedents on the books when the FTAIA was enacted in 1982.[313]

Third, the *Empagran* Court did not overrule *Hartford Fire*, despite the tension between the approach the Court took in 1993 of cabining the comity concern narrowly and the current approach of elevating comity to a preeminent decision rationale. *Hartford Fire* and *Empagran* readily coexist if the rule in *Hartford Fire* is understood as a subject matter jurisdiction rule. Like *Mannington Mills*, once the effects test is satisfied, comity considerations surface to inform a court's prudential consideration whether to exercise its jurisdiction.[314]

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310. *Pfizer*, 434 U.S. at 320.

311. *See id.*, 434 U.S. at 318–20.

312. *See supra* notes 196–205 and accompanying text (tracing the development of standing under FTAIA).

313. The U.S. amnesty program on which the inverse deterrence argument is based was adopted in 1993, and foreign amnesty programs are more recent yet. *See generally* Ashley Burrowes & John MacDonald, *EU Catches Up With US Anti-Trust Legislation*, 17 MANAGERIAL ACCT. J. 593, 593 (2002) (discussing new European Community rules offering leniency for "decisive" information leading to convictions); *see also* U.S. DEP'T OF JUSTICE, CORPORATE LENIENCY POLICY (1993), *available at* http://www.usdoj.gov/atr/public/guidelines/0091.pdf (establishing a leniency program for corporations under which companies may report activities without concern of criminal sanctions); Huffman, *supra* note 2 (manuscript at 41).

314. As the First Circuit recently noted:

> The *Hartford Fire* Court also held that comity considerations, such as whether relief ordered by an American court would conflict with foreign law, were properly understood not as questions of whether a United States court possessed subject matter jurisdiction, but instead as issues of whether such a court should decline to exercise the jurisdiction that it possessed.

McBee v. Delica Co., 417 F.3d 107, 111, 120 (1st Cir. 2005) (citing Hartford Fire Ins. Co. v. California, 509 U.S. 764, 797–98 & n.24 (1993)). "[C]omity considerations are properly analyzed not as questions of whether there is subject matter jurisdiction, but as prudential questions of whether that jurisdiction should be exercised." *Id.* at 121; *see also Hartford Fire*, 509 U.S. at 799 ("We have no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity.").

IV. CURRENT AND FUTURE ISSUES IN FTAIA LITIGATION

A. Issues Left to Be Litigated

1. Definition of "Gives Rise to a Claim." Courts and commentators have not settled on a clear and broadly applicable approach to interpreting the *Empagran* exception. According to Professor Waller, a leading commentator on antitrust extraterritoriality, after *Empagran*, "important questions remain as what circumstances, if any, foreign antitrust plaintiffs suffering injury abroad can bring their claims to U.S. courts. Years of additional litigation or statutory change will be necessary to definitively resolve this critical question."[315] Certainly, with *Empagran* definitively putting a stop to claims of *independent* foreign harm, future claims will seek to exploit the *Empagran* exception.[316]

Other than the *Empagran II* court on remand, the only circuit to address the *Empagran* exception is the Eighth Circuit, which, affirming the District of Minnesota in *In re Monosodium Glutamate Antitrust Litigation*, followed the D.C. Circuit's approach, holding "gives rise to" in the FTAIA's subsection 2 meant proximate, not but-for cause.[317] Like the *Empagran II* court, the Eighth Circuit viewed foreign effects from a price-fixing scheme as distinct from domestic effects; if the domestic effects of price fixing were its "direct or proximate" result, the foreign effects were indirect and attenuated.[318]

Several district courts have followed the D.C. Circuit's lead and have engaged in a proximate cause inquiry. The results, though, have proved to be unpredictable. In *Latino Quimica-Amtex S.A. v. Akzo Nobel Chemicals B.V.*, plaintiffs alleged that "'unlawful price fixing and market allocation conduct had adverse effects in the United States and in other nations that caused injury to Plaintiffs in connection with their foreign MCAA

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315. S*ee* 1 WALLER, *supra* note 3, § 13:23, at 13-62 to -63 (predicting that the Supreme Court will grant certiorari further to clarify the issue).

316. *See, e.g.*, Houston & Pratt, *supra* note 9, at 27 ("It is questionable whether the decision of the Court of Appeals in *Empagran* [*II*] will put significant constraints on Canadian purchasers who wish to bring their claims in the United States. In most international cartel cases which involve Canada, the allegation is a North American conspiracy, not separate conspiracies relating to Canada and the United States.").

317. *In re* Monosodium Glutamate Antitrust Litig., 477 F.3d 535, 538 (8th Cir. 2007) ("'[G]ives rise to' language requires a direct or proximate causal relationship . . . ." (citing Empagran S.A. v. F. Hoffmann–LaRoche, Ltd. (*Empagran II*), 417 F.3d 1267, 1271 (D.C. Cir. 2005))).

318. *Id.* at 538.

purchases.'"[319] Those claims did not state a proximate causal connection to an effect in U.S. commerce.[320]

In *eMag Solutions LLC v. Toda Kogyo Corp.*, plaintiffs' claims also relied on arbitrage allegations, but in that case the plaintiffs specifically alleged they were prepared to engage in arbitrage to end-run fixed prices, but fixed prices in domestic U.S. commerce prevented their doing so.[321] Nonetheless, the allegations did not state a proximate causal connection.[322]

By contrast with those cases, a district court in Connecticut held that allegations raising the same arbitrage concern as the worldwide conspiracy allegations in *Empagran* were sufficient to meet the *Empagran* exception.[323] Plaintiffs alleged the defendants sought to "'ensure that prices charged by [the] [p]laintiffs to end-users in India for [p]roducts would not cause erosion to prices'" in the United States.[324] There is no apparent legally significant distinction between the allegations the District of Connecticut rejected and the allegations held elsewhere not to meet the *Empagran* exception.[325]

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319. Latino Quimica-Amtex v. Akzo Nobel Chem. B.V., No. 03 Civ. 10312(HBDF), 2005 WL 2207017, at *5 (S.D.N.Y. Sept. 8, 2005) (quoting the complaint).

320. Other allegations stated that "'[d]efendants and their co-conspirators' illegal contract, combination and conspiracy to harm U.S. and world commerce directly injured [the] Plaintiffs.'" *Id.* at *9 (quoting the complaint); *see also In re* Dynamic Random Access Memory (DRAM) Antitrust Litig., Nos. C 02-1486 PJH, C 05-3026 PJH, 2006 WL 515629, at *4–5 (N.D. Cal. Mar. 1, 2006) (holding that allegations of a worldwide conspiracy "[w]ithout more . . . constitute no more than the 'but for' causation that the *Empagran* cases find objectionable").

321. eMag Solutions LLC v. Toda Kogyo Corp., No. C 02-1611 PJH, 2005 WL 1712084, at *4 (N.D. Cal. July 20, 2005). Plaintiffs "'would have been particularly well-suited to replace purchases . . . in purely foreign commerce with purchases . . . in American commerce, if the conspiracy had not affected the prices . . . in American commerce.'" *Id.* at *4 (quoting the third-amended complaint).

322. *Id.* at *7.

323. MM Global Servs., Inc. v. Dow Chem. Co., 329 F. Supp. 2d 337, 342 (D. Conn. 2004) (holding that an allegation of foreign injuries may both arise from and give rise to effects on domestic commerce).

324. *Id.* at 340 (alterations in original) (quoting the amended complaint).

325. The only allegation that may distinguish *MM Global* from *Empagran* is that the *MM Global* plaintiffs alleged that "'[a]s a direct and proximate result'" of the defendant's conduct, harm occurred. *Id.* at 342 (quoting the amended complaint). An allegation that something was the proximate cause is an allegation of a legal conclusion, not of fact. *See* Latino Quimica-Amtex v. Akzo Nobel Chem. B.V., No. 03 Civ. 10312(HBDF), 2005 WL 2207017, at *13 (S.D.N.Y. Sept. 8, 2005) ("Without the factual predicate to support these allegations, however, they cannot be read to plead the requisite causal link between the conspiracy's domestic effect and Plaintiffs' foreign claim." (citing Hirsch v. Arthur Anderson & Co., 72 F.3d 1085, 1088, 1092 (2d Cir. 1995))). But the proximate cause allegations in *MM Global* did not relate to a connection between an effect on U.S. commerce and harm in India, as most courts' understanding of the *Empagran* exception requires. The complaint alleged merely the harm felt in India was "'*the result of such effect on competition*'" in the United States. *MM Global*, 329 F. Supp. 2d at 342 (emphasis

A district court in Minnesota initially interpreted the *Empagran* exception consistently with the District of Connecticut.[326] Foreign plaintiffs' allegations of a worldwide conspiracy to fix the prices of fungible, globally marketed products survived a motion to dismiss.[327] But in light of *Empagran II*, the court later reconsidered its holding.[328] It was "persuaded by the decision and reasoning of the District of Columbia Circuit Court of Appeals" in *Empagran II*.[329] The court held on reconsideration a worldwide conspiracy allegation established at best but-for, not proximate, cause, and that *Empagran II* required the latter.[330] The second *In re Monosodium Glutamate Antitrust Litigation* (*In re MSG*) opinion was affirmed by the Eighth Circuit, also following *Empagran II*.[331]

Thus, although I previously have argued the state of authority since *Empagran* is confused,[332] the great weight of authority follows a strict proximate cause inquiry and dismisses all claims by foreign plaintiffs claiming their harm is derivative of a domestic effect. Only the *MM Global* decision is to the contrary. But only two courts of appeals have addressed the issue, and *Empagran* itself clearly did not foreclose all suits by plaintiffs alleging their harm was felt in foreign commerce. Considering also the indeterminacy of the question of proximate cause and the recognition in the FTAIA's legislative history that directness can be a function of magnitude and staying power of an effect, there must be room for claims of foreign harm that is interdependent with a domestic effect to be heard in U.S. courts. This issue remains far from settled.

2. Viability of the Timberlane *Rule Post-FTAIA.* A related question is whether the *Timberlane* rule has retained vitality with the passage of the FTAIA. Under *Timberlane* and the Third

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in original) (quoting the amended complaint). *But see eMag Solutions*, 2005 WL 1712084, at *7 ("The district court in *MM Global* never discussed whether 'but-for' causation is the appropriate standard [and noted that] the case did not concern 'purely foreign' commerce . . . .").

326. *In re* Monosodium Glutamate Antitrust Litig., No. Civ. 00MDL1328, 2005 WL 2810682 (D. Minn. Oct. 26, 2005), *aff'd*, 477 F.3d 535 (8th Cir. 2007).

327. *In re* Monosodium Glutamate Antitrust Litig., No. Civ. 00MDL1328, 2005 WL 1080790 (D. Minn. May 2, 2005), *rev'd* 2005 WL 2810682, *aff'd*, 477 F.3d 535 (8th Cir. 2007).

328. *Monosodium Glutamate*, 2005 WL 2810682, at *1.

329. *Id.* at *3.

330. *Id.*

331. *See In re* Monosodium Glutamate Antitrust Litig., 477 F.3d 535, 539–40 (8th Cir. 2007).

332. *See* Huffman, *supra* note 2 (manuscript at 65).

Circuit's substantively analogous *Mannington Mills* decision, a comity analysis similar to that set out in section 403 of the *Third Restatement of Foreign Relations* was either part of, or followed, the jurisdictional inquiry under *Alcoa*.[333] The FTAIA explicitly adopted a version of the effects test in subsection 1.[334] The legislative history reflects awareness and approval of the *Timberlane/Mannington Mills* approach.[335] But there is no indication in the text of the statute whether an appropriate place exists for a comity-based inquiry.

The Supreme Court in *Empagran* answered that question in part, relying on comity principles in interpreting subsection 2 to limit the class of plaintiffs permitted to sue in a U.S. antitrust court to those plaintiffs claiming harm as a result of an effect in U.S. commerce.[336] But the Court denounced reliance on case-by-case analysis of comity principles, at least as regards claims by plaintiffs suffering independent foreign harm.[337] The Court preferred to state a bright-line rule barring all claims by plaintiffs who suffered harm in wholly foreign commerce.[338] Courts should recognize the *Timberlane* comity analysis remains available to inform the standing question for those claims that are interdependent with a U.S. effect.[339]

3. Whether There Is Room in Modern Extraterritoriality Analysis for a "Conduct Test." The emphasis in antitrust extraterritoriality since *Alcoa* has been on the location of the injury—not the conduct—a deviation from early decisions like *American Banana*, which looked primarily to the location of the conduct causing the harm.[340] The FTAIA adopted the *Alcoa* "effects" approach in subsection 1's "direct, substantial, and reasonably foreseeable" formulation[341]—largely, I have argued,

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333. *See supra* notes 62–87 and accompanying text.

334. 15 U.S.C. § 6a(1) (2000).

335. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 799 (1993) (noting a House Report that reserved to courts power to use comity principles); *see also* JOELSON, *supra* note 10, at 42 ("[T]he legislators included language in the House Committee Report to the effect that courts were still free to 'employ notions of comity . . . or otherwise . . . take account of the international character of the transaction.'" (omissions in original)).

336. *See* F. Hoffmann–La Roche Ltd. v. Empagran, 542 U.S. 155, 168–69 (2004).

337. *Id.* at 168.

338. *Id.* (noting that the case-by-case approach is "too complex to prove workable").

339. *See* Huffman, *supra* note 2 (manuscript at 43) (discussing the approval of *Timberlane* in *Empagran*).

340. *See supra* notes 37–38 and accompanying text.

341. 15 U.S.C. § 6a(1) (2000).

for protectionist purposes.[342] Congress and the courts seemingly have abandoned, in the antitrust realm, the concern for exporting bad effects that underlies Judge Friendly's opinion in *Bersch v. Drexel Firestone*, *Inc.*[343] dealing with issues of extraterritoriality under the securities laws. In *Bersch*, Judge Friendly opined that "Congress did not mean the United States to be used as a base for fraudulent securities schemes even when the victims are foreigners . . . ."[344]

Concentrating wholly on the location of the effects and ignoring the location of the conduct reflects a willingness to export harm, so long as there is no harm in domestic commerce.[345] The best textual example in the FTAIA is the limitation on suits over injury suffered in export commerce to those brought by U.S. exporters.[346] And the legislative history specifically endorses the reading some have made of *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, that claims of conduct with pro-competitive or neutral impact at home, but anticompetitive effect abroad, are not cognizable under the U.S. antitrust laws.[347]

4. The Application of the FTAIA to Antitrust Claims Based on Conduct Other Than Cartel Activity. Most modern FTAIA cases arise in the context of price-fixing claims. The application of the statute is much less developed in the context of other claims such as, for example, unilateral monopolization claims under section 2 of the Sherman Act. One recent case applying the FTAIA in the context of a section 2 claim is the District of Delaware's decision adding another chapter to two chip-making giants' lengthy antitrust battle taking place in multiple forums. The court held in *In re Intel Corp. Microprocessor Antitrust Litigation* that claims by plaintiff manufacturers who operated only in Germany, alleging exclusionary conduct by a U.S.-based worldwide computer chip manufacturer precluded plaintiffs' succeeding in competition in foreign markets, were not permitted

342. *See supra* Part II.B.1.

343. *See* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985 n.24 (2d Cir. 1975) ("Any fraudulent misrepresentations were neither made nor relied on in the United States.").

344. *Id.* at 987.

345. *See* Wood, *supra* note 10, at xiv.

346. 15 U.S.C. § 6a(1)(B) (2000).

347. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582–84 (1986) ("Respondents cannot recover antitrust damages based solely on an alleged cartelization of the Japanese market, because American antitrust laws do not regulate the competitive conditions of other nations' economies.").

in U.S. court, despite allegations of a world-wide price-fixing conspiracy.[348]

The *Intel* court employed both directness inquiries under the FTAIA.[349] First, it held the effect on U.S. commerce was not direct, despite plaintiff's allegations "that it is an American company engaged in a world-wide market."[350] Second, despite allegations that plaintiff's harm was "inextricably bound up with domestic restraints of trade," the court held the effect on U.S. commerce did not directly give rise to the plaintiff's claim.[351]

Although the court was not persuaded in *Intel*, when the plaintiff is itself a multinational company with business in a variety of jurisdictions, it is even more difficult to separate foreign effects from domestic effects. In *Intel*, the defendant's ability to prevent the plaintiff from competing on a world-wide scale certainly contributes to the plaintiff's success maintaining or establishing a monopoly position in domestic commerce. The *Intel* court saw these as "ripple effects."[352] If they achieve a certain magnitude, however, they should be considered much more. It is not difficult to imagine—especially in a world in which electronics manufacturing occurs largely in foreign commerce—that monopolizing foreign commerce can be dispositive of efforts to compete domestically.[353]

B. Reform Efforts

Reform efforts are under way. The Antitrust Modernization Committee (AMC), a twelve-member organization with members appointed by the President, U.S. Senate, and U.S. House of Representatives, was charged by Congress in the Antitrust Modernization Committee Act of 2002 with

> 1. [examining] whether the need exists to modernize the antitrust laws and to identify and study related issues;

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348. *In re* Intel Corp. Microprocessor Antitrust Litig., 452 F. Supp. 2d 555, 561 (D. Del. 2006).

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*

353. Also, although a domestic plaintiff purchasing in a foreign market may not be suffering harm due to a domestic effect, if that same plaintiff is purchasing an input for use in a domestic manufacturing operation, the situation might be different. *But see* Liamuiga Tours v. Travel Impressions, Ltd., 617 F. Supp. 920, 922–23 (E.D.N.Y. 1985) (finding no jurisdictional nexus where claims involved entirely lost business and anticompetitive effects in St. Kitts, despite arguments that the effect is to increase prices to U.S. purchasers seeking to travel to St. Kitts).

> 2. [soliciting] views of all parties concerned with the operation of the antitrust laws;
> 3. [evaluating] the advisability of proposals and current arrangements with respect to any issues so identified; and
> 4. [preparing] and . . . submit[ting] to Congress and the President a report . . . .
>
> [which] contain[s] a detailed statement of the findings and conclusions of the Commission, together with recommendations for legislative or administrative action the Commission considers to be appropriate.[354]

The AMC includes as a member John Shenefield, former head of the Antitrust Division at the Department of Justice, the chair of a prior commission studying the antitrust laws during the 1970s,[355] and an important witness in the hearings leading up to the enactment of the FTAIA. Makan Delrahim, at the time of the Supreme Court's *Empagran* decision, the Deputy Assistant Attorney General in charge of international antitrust matters at the Antitrust Division,[356] and in that capacity a signatory on the brief of the United States filed at the Supreme Court in the *Empagran* case, is also a commissioner.[357]

In its final *Report and Recommendations*, issued in early April, the AMC considered possible reforms to the FTAIA—namely, the first four "[i]nternational [i]ssues [r]ecommended for [c]ommission [s]tudy" in a memorandum from 2004, the year the AMC began its work.[358] The proposals for reform considered by the AMC have included (1) doing nothing and letting the common law process sort out remaining issues—an approach I previously have suggested,[359] (2) doing nothing except recommending courts follow the District of Columbia Circuit's lead in interpreting the FTAIA—an efficient approach if one is sympathetic to the "proximate cause" inquiry the *Empagran II* court adopted, given

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354. Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, §§ 11053, 11058, 116 Stat. 1856, 1856, 1859, *quoted in* Antitrust Modernization Comm'n, About the Commission, http://www.amc.gov/about_commission.htm (last visited Apr. 14, 2007).

355. *See* AMC REPORT, *supra* note 3, app. 67.

356. *See* Antitrust Modernization Comm'n, Commissioner & Commissioner Staff Bios, http://www.amc.gov/bios.htm (last visited Apr. 14, 2007).

357. Brief for the United States as Amicus Curiae Supporting Petitioners, F. Hoffmann–La Roche Ltd. v. Empagran, 542 U.S. 155 (2004) (No. 03-724), *available at* http://www.usdoj.gov/osg/briefs/2003/3mer/1ami/2003-0724.mer.ami.pdf.

358. Memorandum from the Int'l Working Group to Comm'rs, Antitrust Modernization Comm'n, 1, 2 (Dec. 21, 2004), *available at* http://www.amc.gov/pdf/meetings/International.pdf.

359. *See* Huffman, *supra* note 2 (manuscript at 65).

the apparent inclination of courts to do that on their own,[360] or (3) recommending a redraft of the FTAIA.[361] In the final *Report and Recommendation*, eleven of the twelve commissioners announced a "general principle" as to the interpretation of the FTAIA that it believed "fairly represents the intent of Congress in enacting the FTAIA, is consistent with the Supreme Court's holding in *Empagran*, and describes how court decisions should apply the FTAIA."[362] "As a general principle, purchases made outside the United States from a seller outside the United States should not be deemed to give rise to the requisite effects under the Foreign Trade Antitrust Improvements Act."[363] Makan Delrahim did not join the recommendation.[364]

The eleven commissioners who did join were split nearly evenly on whether to recommend an amendment to the FTAIA, or simply to encourage courts to produce this result as a matter of the statute's common-law development.[365] The AMC Report recognized that most courts, including one other federal court of appeals, have followed *Empagran II*.[366] Although the AMC Report did not propose language for a possible amendment, various suggested amendments were considered before the AMC Report was completed. One example of an amended FTAIA the AMC considered reads as follows:

> (1) Sections 1 through 7 of this title shall not apply to conduct occurring outside the United States unless such conduct has a direct, substantial, and reasonably foreseeable effect on:
>
> (a) commerce within the United States;
>
> (b) import commerce with foreign nations; or
>
> (c) export commerce with foreign nations.
>
> (2) Any person who suffers a direct and proximate injury as a result of such effect may bring an action under Sections 1 through 7 of this title. Any person who makes a purchase outside the United States from a seller outside the United States shall be deemed not to have suffered injury as a result of such effect.

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360. *See supra* Part V.A.1.

361. *See* Antitrust Modernization Comm'n, Supplemental International Antitrust Discussion Outline 1 (Dec. 1, 2006), [hereinafter AMC Outline] *available at* http://www.amc.gov/pdf/meetings/061201_Intl-FTAIA3dSuppOutline.pdf.

362. AMC REPORT, *supra* note 3, at 228 & n.*.

363. *Id.*

364. *Id.* Unfortunately, in his separate statement, Delrahim did not explain his reasons for not joining.

365. *Id.*

366. *See id.* at 228 & n.128 (citing cases including *In re* Monosodium Glutamate Antitrust Litig. (*MSG*), 477 F.3d 535 (8th Cir. 2007)).

> (3) If sections 1 to 7 of this title apply to conduct only because of the operation of paragraph (1)(c), then only the United States may bring an action under Sections 1 through 7 of this title.[367]

The Language—which, if somewhat overwrought, at least has the virtue of clarity that the FTAIA lacks—likely was abandoned in the final report because it goes far beyond the general principle on which eleven commissioners did agree. Through the operation of subsection 3, the proposed language would have removed any right of action by U.S. exporters for harm suffered in export commerce.[368] The amendment also sets in stone the strictest possible reading of the D.C. Circuit's *Empagran II* decision—effectively the result reached by the Northern District of California in *eMag Solutions*.[369] Subsection 2 forecloses in unambiguous terms *any* suit claiming harm suffered in foreign commerce, no matter how direct or proximate the connection between a domestic effect and the claimed foreign harm.[370]

Amendments to the FTAIA should be avoided as almost certainly ineffective at accomplishing their intended result and possibly deleterious to the worthy goal of "respect[ing] appropriate jurisdictional boundaries."[371] An important lesson from the original enactment of the FTAIA—which, though intended to limit U.S. antitrust courts' extraterritorial reach, was interpreted by at least two Federal Courts of Appeals to expand the extraterritorial reach of the U.S. antitrust laws—is that efforts to reduce common-law principles to statute in this arena

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367. AMC Outline, *supra* note 361, at 1.

368. *Compare* 15 U.S.C. § 6a (exporters may sue for harm in export commerce).

369. *See* eMag Solutions LLC v. Toda Kogyo Corp., No. C 02-1611 PJH, 2005 WL 1712084, at *5 (N.D. Cal. July 20, 2005) (noting that plaintiffs "could have purchased the rest of their [requirements] from the U.S. market had it remained competitive").

370. *Compare In re MSG*, 477 F.3d 535, 539–540 (finding that direct and proximate result of a domestic effect would permit a claim under the FTAIA).

371. ANTITRUST MODERNIZATION COMM'N, AMC REPORT: INTRODUCTION AND EXECUTIVE SUMMARY 6 (Jan. 10, 2007) (preliminary draft outline), *available at* http://www.amc.gov/pdf/meetings/Rep-ExecSum_070110circ.pdf. The common-law approach to extraterritoriality would have the effect of permitting greater extraterritorial application as world-wide standards for antitrust enforcement converge. *See* Kovacic, *Extraterritoriality, Institutions, and Convergence in International Competition Policy*, *supra* note 99, at 309; *cf.* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 799 (1993) (holding that extraterritorial application is permissible if there is no conflict in legal schema); ZWARENSTEYN, *supra* note 19, at 99 ("[T]here is no reason why" the prerogative of a particular State to regulating conduct within its borders "should be exclusive when dealing with judicial jurisdiction. In a world of close cooperation and similar views with regard to law enforcement it would be quite conceivable that a violation committed in one State would be adjudicated in another State." (footnote omitted)).

can produce perverse results.[372] Certainly the commission was wise to abandon the most recent proposed amendment, the language quoted above. The language would have overruled a part of the Supreme Court's holding in *Empagran* and would have gone too far by unambiguously foreclosing any possibility that an injury both suffered and inflicted overseas could be adjudicated in a U.S. antitrust court, even if there was an immediate nexus between that injury and an effect in U.S. commerce.[373]

The *eMag Solutions* rule and the suggested amendments to the FTAIA threaten substantial under-deterrence. In circumstances in which suits by domestic plaintiffs cannot be expected to sufficiently deter anticompetitive behavior in domestic commerce, sufficient deterrence can be achieved by permitting suits by foreign plaintiffs who suffer harm inseparable from the effect on U.S. commerce. "[A]n exclusion of all foreign plaintiffs would lessen the deterrent effect of treble damages."[374] The proposed amendment the commission abandoned would have derogated from a worthy principle the commission advances elsewhere—that of "minimiz[ing] overdeterrence and underdeterrence."[375]

V. CONCLUSION

The FTAIA was born of the tri-partite desires to protect American exporters, to introduce clarity into the law governing extraterritorial application of the U.S. antitrust laws, and to mitigate diplomatic conflict with foreign trading partners. Progress on those fronts has been made. But little proof exists the FTAIA is a necessary, or sufficient, tool for achieving that progress. It is likely that the comity-driven approach from *Timberlane*, amending as it did the controversial *Alcoa* effects test, would have accomplished the third goal—mitigating diplomatic conflict—just as well as has the statute. The second goal, introducing clarity, has not been realized. In those areas

372. *Cf.* TAFT, *supra* note 134, at 131–33 (arguing against amendments to the Sherman Act, which became the Clayton Act of 1914, because of the sufficient clarity provided by the common-law development under the law).

373. *See* MM Global Servs., Inc. v. Dow Chem. Co., 329 F. Supp. 2d 337, 342 (D. Conn. 2004) (rejecting Dow Chemical's "assertion that it is impossible for the plaintiffs to allege both that the injuries gave rise to domestic affects on commerce and that domestic effects also gave rise to their injuries").

374. Pfizer, Inc. v. Gov't of India, 434 U.S. 308, 315 (1978); *see also* Huffman, *supra* note 2 (manuscript at 57–58) (discussing *Pfizer* and the ability of extraterritorial violators "'avoiding legal authority'" (quoting *Pfizer*, 434 U.S. at 315)).

375. AMC REPORT, *supra* note 3, at 90.

where clarity exists, it is because of extraterritoriality standards that effectively eliminate any role for foreign plaintiffs in enforcing the U.S. antitrust laws. That is a clear standard, to be sure, but it is much broader than any Congress intended to impose under the FTAIA.

But there is no indication the FTAIA will be amended or repealed. The AMC Report fortunately failed to make such a recommendation—the proposed amendment crafted during deliberations on the final report was awkwardly worded and achieved clarity only through absolutism. As is the tradition with antitrust analysis, then, the development of extraterritoriality principles remains in the hands of common-law courts. Much room for clarification remains.